Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

VACANCES HELIADES S.A. AND
NIMELIAS ENTERPRISES S.A.,

Petitioners,

v.

AAR INTERNATIONAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In determining in which forum a case should proceed, must the court give dispositive weight to a forum selection clause in the agreement between the parties, or may it consider the clause as one factor together with other factors?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Vacances Heliades S.A. states that it has no corporate parent and that no publicly held company owns ten percent or more of Vacances Heliades S.A.'s stock.

Petitioner Nimelias Enterprises S.A. states that it is a wholly-owned subsidiary of Vacances Heliades S.A.

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No. _____

IN THE

Supreme Court of the United States

VACANCES HELIADES S.A. AND
NIMELIAS ENTERPRISES S.A.,

Petitioners,

v.

AAR INTERNATIONAL, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners respectfully pray that a writ of certiorari be issued to review the order and opinion of the United States Court of Appeals for the Seventh Circuit entered on April 27, 2001.

OPINIONS BELOW

The opinion of the court of appeals (App. B, *infra*, B-1 to B-26) is reported at *AAR Int'l, Inc. v. Nimelias Enter. S.A.*, 250 F.3d 527 (7th Cir. 2001). The opinion of the United States District Court for the Northern District of Illinois (App. D, *infra*, D-1 to D-8) is reported at *AAR Int'l, Inc. v. Vacances Heliades S.A.*, 100 F. Supp. 2d 875 (N.D. Ill. 2001).

STATEMENT OF JURISDICTION

The judgment of the Seventh Circuit was entered on April 27, 2001. On July 18, 2001, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including August 25, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The doctrine of *forum non conveniens* is not statutory.

28 U.S.C. § 1404(a) provides that "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE

1. This case involves the weight to be given to a clause in a business agreement between sophisticated corporations designating a forum for resolution of disputes about the agreement. These forum selection clauses are common in domestic and international agreements, because parties seek certainty. Confusion in the case law has undermined this certainty in two important respects: first, as a general matter, there is confusion regarding whether these clauses are to be dispositive or merely a factor when a court considers a motion to dismiss for *forum non conveniens* or to transfer venue under 28 U.S.C. § 1404(a); and, second, there is confusion regarding the extent to which the answer to that question is affected by whether the forum selection clause permits only one forum (is "exclusive") or more than one forum (is "nonexclusive"), and whether the forum selection clause's language requires the forum (is "mandatory") or merely permits it (is "permissive").

The United States courts of appeal are divided in both respects. It is significant that this division is occasioned by two opinions of this Court with respect to forum selection

clauses. In *The Bremen v. Zapata Off-Shore Co.*, this Court directed the district courts, in considering a motion to dismiss for *forum non conveniens*, to give a forum selection clause dispositive weight. 407 U.S. 1, 15 (1972). On the other hand, in *Stewart Organization, Inc. v. Ricoh Corp.*, this Court permitted the district courts, in considering motions to transfer venue pursuant to 28 U.S.C. § 1404(a), to treat a forum selection clause as only one of several factors. 487 U.S. 22, 29 (1988).

What has resulted is a *The Bremen* line of cases and a *Stewart* line of cases at odds with each other. For the most part, *The Bremen* line of cases gives the forum selection clause dispositive effect, while the *Stewart* cases do not. The consequence is that if the selected forum is another federal court, a party will usually seek to enforce the agreement with a motion to transfer venue under section 1404(a) and the clause will be given a weak effect, whereas if the selected forum is a foreign court, the agreement will generally be enforced by a *forum non conveniens* motion and the clause will be given a stronger effect.

Neither *The Bremen* nor *Stewart* speaks to the effect to be given to clauses that are phrased in permissive rather than mandatory terms or that select more than one possible forum.

2. Petitioner Vacances Heliades S.A. ("VH") is a French corporation. App. D, *infra*, D-1, n.1. In May 1998, VH leased an airplane from Respondent AAR International, Inc. ("AAR"), App. B, *infra*, B-2, an Illinois corporation, App. D, *infra*, D-1, n.1, and, in turn, subleased the airplane to Nimelias Enterprises S.A, App. B, *infra*, B-2, a Cypriot corporation. App. D, *infra*, D-1, n. 1. After the airplane experienced mechanical problems, VH was forced to remove an engine from the airplane and repair it at considerable expense. App. B, *infra*, B-4. Contending that AAR breached the lease's provision guaranteeing performance of the engines, VH sued AAR in court in Greece, where the

petitioners did business and where the airplane was located. *Id.*

A clause in the lease agreement captioned "Nonexclusive Jurisdiction in Illinois," provided that either party could bring a case in the United States District Court for the Northern District of Illinois, in the Illinois Supreme Court, in any jurisdiction in which either party or its assets may be found, or in any other appropriate jurisdiction. App. E, *infra,* E-1. The clause further provided that neither party would challenge the other party's choice of forum in Illinois as inconvenient. *Id.* at E-2.

Instead of asserting its own claims (that VH was in default of its lease obligations) as counterclaims in the Greek action, AAR later chose to bring an original action against VH in the United States District Court for the Northern District of Illinois, Eastern Division. App. D, *infra,* D-2. After AAR filed suit in that court, VH moved for the district court to abstain in favor of the earlier filed action in Greece and for dismissal on *forum non conveniens* grounds. *Id.* The district court granted abstention but did not reach the *forum non conveniens* issue. *Id.* at D-7.

On appeal, the United States Court of Appeals for the Seventh Circuit reversed the abstention ruling and decided the *forum non conveniens* issue. App. B, *infra*, B-1 to B-26. It observed that "the district court did not address [that issue], presumably deeming it mooted by its decision to abstain the action." *Id.* at B-19. VH objected to the court of appeals' consideration of this matter, for there had been no ruling by the district court. *Id.* The court of appeals noted that, as a general rule, an appellate court may not consider an issue not passed on below. *Id.* at B-20. But it viewed "the proper resolution of the issue" as "clear" and "beyond any doubt" and proceeded to decide the question. *Id.*

The court of appeals treated the combination of the permissive forum selection clause's provision that the

Northern District of Illinois would be an appropriate forum to resolve a dispute together with the provision that a party would not object to the other party's choice of forum in Illinois on convenience grounds as tantamount to a mandatory forum selection clause. *Id.* at B-24. It then held, stating that it was following *The Bremen*, that the so-deemed "mandatory" forum selection clause was dispositive of the *forum non conveniens* motion.[1] *Id.* In doing so, the Seventh Circuit noted that other circuits disagreed with its approach. *Id.* at B-22 to B-24. Because it believed that its ruling was compelled as a matter of law, the court of appeals ordered the district court to deny VH's motion to dismiss on grounds of *forum non conveniens. Id.* at B-25.

REASONS FOR GRANTING THE PETITION

A. Certainty in international agreements, recognized as important in *The Bremen* in 1972, is needed even more today. U.S. trade increased 25-fold between 1970 and 2000 and the United States is the largest trading nation in the world.[2]

Issues as to the selection of a proper forum for the resolution of disputes have been very much alive in the courts. Shepards shows 1515 federal and state cases citing *The Bremen* and 737 citing *Stewart*.[3]

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[1] The Seventh Circuit said it would not apply the provision that a party would not object to the other's choice of forum in Illinois to either the doctrine of abstention, *see* App. B, *infra,* B-19 or the first filed rule. *Id.* at B-24, n.10.

[2] *See* UNITED STATES TRADE REPRESENTATIVE, 2001 TRADE POLICY AGENDA AND 2000 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM, Appendix I at 1 (March 2001).

[3] Shepards® on Lexis Nexis™ was accessed on August 16, 2001. Note: The total number of cases will be less than the arithmetic total of these two numbers because some cases have cited both *The Bremen* and *Stewart*.

The conflicts and confusion in the courts with respect to forum selection clauses warrant review by this Court. The decision of the court of appeals in this case raises these issues appropriately. The court of appeals candidly noted that other circuits disagree with its holding both as to the dispositive effect of a forum selection clause and as to its view that the type of clause in this case was mandatory, and thus dispositive.

B. The Seventh Circuit's decision in this case (following *The Bremen*) notes that it is in conflict with the First Circuit's decision in *Royal Bed & Spring Co., Inc. v. Famoussul Indus. e Comercio de Moveis Ltda.*, 906 F.2d 45 (1st Cir. 1990) (following *Stewart*). App. B, *infra*, B-22. In *Royal Bed*, the First Circuit said:

> ". . . [S]ection 1404(a) does not apply. Nonetheless, even though a foreign jurisdiction was chosen by the parties, that fact should not preclude the application of sound principles of forum non conveniens enunciated in Stewart and similar cases . . . . [T]he forum-selection provision is not given dispositive effect. Rather, it is simply one of the factors that should be considered and balanced by the courts in the exercise of sound discretion. See Stewart . . . ."

906 F.2d at 51.

It is difficult to understand why an identical forum selection clause should be treated differently in motions to transfer venue and in motions to dismiss on grounds of *forum non conveniens*. One commentator has described this difference as a "bizarre dichotomy."[4] The purpose of the two

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[4] *See* Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 70-71 (1992). Other commentators also criticize this dichotomy. *See* Phoebe Kornfeld, *The Enforcement of Forum-Selection Clauses After Stewart Organization, Inc. v. Ricoh Corporation*, 6 ALASKA

procedural mechanisms is essentially the same. The only real difference is that a motion to dismiss for *forum non conveniens* must be made when the alternative forum is not within the United States because a motion to transfer venue under 28 U.S.C. § 1404(a) will not be available. It is not surprising that, in the absence of a forum selection clause, federal courts consider similar factors when deciding motions to transfer venue and motions to dismiss on grounds of *forum non conveniens*.[5]

Because the Seventh Circuit's decision in this case conflicts with that of the First Circuit in *Royal Bed* with respect to the dispositive effect to be given to forum selection clauses in international agreements under the *forum non conveniens* doctrine, and because both decisions continue the confusion engendered by *The Bremen* and *Stewart*, review by this Court is warranted.

C. Review is also warranted because the Seventh Circuit's interpretation of the forum selection clause conflicts with interpretations of other courts of appeal.

Some courts of appeal expressly distinguish between "mandatory" and "permissive" forum selection clauses when considering motions to dismiss for *forum non conveniens*. These courts give a "mandatory" forum selection clause

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L. REV. 175, 191 (1989) ("Altogether, under Stewart, contracts become equivocal and the contracting parties lose predictability and certainty in their relationship."); Leandra Lederman, *Viva Zapata!: Toward A Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422 (1991); David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMPLE L. REV. 787 (1993).

[5] *See* 17 MOORE'S FEDERAL PRACTICE § 111.03 at *4, n.9 (transfer factors same as *forum non conveniens* factors); 17 MOORE'S FEDERAL PRACTICE § 111.74 at *8 (*forum non conveniens* factors); 17 MOORE'S FEDERAL PRACTICE § 111.13 at *4 (Section 1404 factors). *See also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-509 (1947); and *Stewart*, 487 U.S. at 29.

dispositive weight when considering such a motion but weigh a "permissive" forum selection clause as only one factor in the analysis. However, when it is not clear that a clause is "mandatory" – i.e., when the clause does not unambiguously state that a party "must" in all circumstances go to only one particular forum – the courts of appeal seem confused about whether that clause should be characterized as "mandatory" or "permissive." As a result, nomenclature and drafting confusion undermine desired certainty concerning such agreements.

In the case presented for review, the Seventh Circuit interpreted the parties' forum selection clause as "mandatory," because, even though it was drafted with "permissive" and "nonexclusive" language (i.e., it provided that suit "may" be brought in Illinois and in other jurisdictions), it also provided that a party would not object to another party's choice of venue in Illinois on the ground that such a court is an inconvenient forum. App. B, *infra*, B-24. As a result, the court held that the strict standards of *The Bremen* applied, making the clause dispositive of VH's motion to dismiss for *forum non conveniens*. *Id.*

The Seventh Circuit acknowledged that the Second Circuit took the contrary view of a similar clause in *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974 (2d Cir. 1993). App. B, *infra*, B-24. In *Blanco*, as in this case, the forum selection clause was drafted in both "permissive" and "nonexclusive" language (i.e., it provided that suit "may" be brought in an English court, a New York state court, a New York federal court, or a court in the City of Caracas, Venezuela). *Blanco*, 997 F.2d at 979. In the case presented for review, the Seventh Circuit asserted that *Blanco's* conclusion was "reasonable," App. B, *infra*, B-24, because, as *Blanco* said, the clause was not strengthened by any language adding a party's "'irrevocable consent'" to a suit in the

designated fora or a waiver of *forum non conveniens* objections.[6] *Blanco*, 997 F.2d at 979.

It is hard to understand why added language in a forum selection clause specifically stating that a party will not object to a chosen forum should have any effect at all, much less turn a decision one way or the other. Presumably, such nonobjections would be implicit in the parties' agreement to the clause. This Court seemed to say as much in *The Bremen*: "...[It] is difficult to see why any such claim of inconvenience should be heard to render the forum clause unenforceable." 407 U.S. at 16.

The Ninth Circuit arrived at the same conclusion of unenforceability as the Second Circuit in *Blanco,* using a different approach. In *Fil Leveraged U.S. Government Bond Fund Ltd. v. TCW Funds Mgmt., Inc.,* the Ninth Circuit equated "exclusive" with "mandatory" and "nonexclusive" with "permissive." 1998 U.S. App. LEXIS 17586, at *5 (9th Cir. July 29, 1998). Since the forum selection clause was "nonexclusive," the *Fil* court held that *The Bremen's* heightened standards did not apply. *Id.* at *6. *Fil* is in direct conflict with the case presented for review. *See also* the following Ninth Circuit cases in contexts other than *forum non conveniens*: *Com Systems, Inc. v. Nahmad*, 1991 U.S. App. LEXIS 1318 (9th Cir. January 28, 1991) (affirming the district court's denial of a motion to dismiss based on a forum selection clause solely because the forum selection clause used the expressly permissive, rather than mandatory,

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[6] Solely because of "the nonmandatory words the parties chose to express their agreement...and not...because the permissive clause contemplates more than one forum," the court in *Blanco* distinguished *The Bremen's* exclusive and mandatory clause and refused to apply the stricter standards to the *forum non conveniens* motion. *Blanco*, 997 F.3d at 979. In *Blanco*, the dissenting judge accused the majority of the panel of ruling on the basis that the clause was "nonexclusive," *see* 997 F.2d at 985, but the majority denied it was doing so. *Id.* at 979.

language "may" ("venue may be laid in Dade County"), and not because of the clause's nonexclusivity); *N. Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034, 1036 (9th Cir. 1995) (holding that a forum selection clause providing that an arbitration award "shall" be enforceable by a petition filed in a particular California state court was "permissive" because it said nothing about exclusive jurisdiction and instead only indicated consent to jurisdiction in that court); *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 77 (9th Cir. 1987) (holding that a clause that provided that "the courts of California, Orange County, shall have jurisdiction" did not provide for exclusive jurisdiction, and therefore was permissive).

See also the following Fifth Circuit cases: *Caldas & Sons, Inc. v. Willingham*, 17 F.3d 123, 127, 128 (5th Cir. 1994) (holding that, as opposed to the unambiguous mandatory forum selection clause in *The Bremen*, the parties' nonexclusive clause providing that "the courts of Zurich shall be applicable" was "permissive" because it merely indicated that the parties consented to – rather than required – jurisdiction in Zurich); *Keaty v. Freeport Indonesia, Inc.*, 503 F.2d 955, 956 (5th Cir. 1974) (holding as permissive a clause that provided that "the parties submit to the jurisdiction of the courts of New York"). And *see* the Eleventh Circuit case, *Citro Florida, Inc. v. Citrovare, S.A.*, 760 F.2d 1231, 1231-32 (11th Cir. 1985) (emphasis in original) (The forum selection clause "'place of jurisdiction is Sao Paulo/Brazil' does not clearly specify that Sao Paulo is the only place of jurisdiction....The *Bremen* court, however, was faced with a much more specific clause. There the contract provided that any dispute 'must be treated before the London Court of Justice.'")[7]

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[7] These cases, in turn, appear to conflict with, e.g., *Seward v. Devine*, 888 F.2d 957, 962 (2d Cir. 1989) (affirming dismissal based on a mandatory forum selection clause because the forum selection clause

D. The decision in this case was incorrect.

1. Although the court of appeals stated that its decision was made on the basis of *The Bremen*, that case does not support the court of appeals' decision. In *The Bremen*, the parties contracted to transport an oil rig from Louisiana to the Adriatic Sea. 407 U.S. at 2. During transportation, the rig was damaged and towed to Tampa, Florida, where one party filed a suit in the federal district court. *Id.* at 3. The other party asked the court to enforce the forum selection clause contained in the contract, requiring exclusive jurisdiction in the High Court of Justice in London. *Id.*

This Court in *The Bremen* placed much emphasis on the certainty of that forum. This Court said:

> "It cannot be doubted for a moment that the parties sought to provide for a neutral forum for the resolution of any disputes arising during the tow. Manifestly much uncertainty and great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident occurred or if jurisdiction were left to any place where the Bremen or Unterweser might happen to be found. The elimination of all such uncertainty by agreeing in advance in a forum acceptable to both parties is an indispensable element of international trade, commerce, and contracting."

Id. at 13-14 (footnote omitted).

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provided that a particular New York state court "shall" have jurisdiction) and *Milk 'N' More v. Beavert*, 963 F.2d 1342, 1345-1346, (10th Cir. 1992) (affirming a district court's remand to state court because it was sufficiently clear that a forum selection clause providing that "venue shall be proper...in Johnson County, Kansas" required venue in that particular state court).

The forum selection clause in this case was not at all like the exclusive selection clause praised in *The Bremen* as eliminating uncertainty. It was, rather, like the other situation that this Court in *The Bremen* decried – " . . . any place where the Bremen or Unterweser might happen to be found." *Id.* As already noted, the forum selection clause in this case permits, in addition to courts in Illinois, "jurisdiction where [either party] or its assets may be found . . . or in any other appropriate jurisdiction." App. E, *infra*, E-1. In *The Bremen*, this Court was concerned about multiple jurisdictions between Louisiana and the Adriatic Sea. The subject matter of the lease in this case is a Boeing 737 airplane. Jurisdiction is potentially available virtually anywhere in the world.

2. "The proper resolution of this issue" was scarcely "beyond any doubt," as the Seventh Circuit said when it undertook to consider the issue in the first instance and then ruled as a matter of law. It should have remanded to the district court for its initial determination.

E. This is an area of the law where predictability is important. Business, their lawyers, and courts will benefit from a clarification of the conflicts that divide the courts of appeal. A possible solution to the current dichotomy between *The Bremen* and *Stewart* lines of cases and the confusion about wording could be (1) that a forum selection clause that requires venue in only one jurisdiction be presumptively dispositive in every context in which a district court is to make a determination as to which forum a case is to proceed in, and (2) that a clause that does not require such exclusive venue be one factor to be given such weight as the court shall determine, together with other factors, in its discretion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 2001

APPENDIX A:
JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DATED AND FILED APRIL 27, 2001

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: April 27, 2001

BEFORE: Honorable WILLIAM J. BAUER,
Circuit Judge

Honorable DANIEL A. MANION,
Circuit Judge

Honorable ILANA DIAMOND ROVNER,
Circuit Judge

No. 00-2737

AAR INTERNATIONAL, INCORPORATED
Plaintiff – Appellant,

v.

NIMELIAS ENTERPRISES S.A., VACANCES HELIADES S.A. and PRINCESS AIRLINES S.A.,
Defendants – Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 99 C 8090, Elaine E. Bucklo, Judge

For the foregoing reasons, we REVERSE, with costs, the district court's decision to abstain and REMAND with instructions to vacate the dismissal order and to deny the appellees' motion to dismiss on grounds of *forum non conveniens*. The above is in accordance with the decision of this court entered on this date.

(1061-110393)

APPENDIX B: OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DATED AND FILED APRIL 27, 2001

In the
United States Court of Appeals
for the Seventh Circuit

No. 00-2737

AAR INTERNATIONAL, INCORPORATED,

Plaintiff-Appellant,

v.

Nimelias Enterprises S.A., Vacances Heliades S.A. and Princess Airlines S.A.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 99 C 8090—**Elaine E. Bucklo**, Judge

ARGUED DECEMBER 7, 2000—DECIDED APRIL 27, 2001

Before BAUER, MANION, and ROVNER, *Circuit Judges*.

BAUER, *Circuit Judge*. AAR International, Inc. ("AAR") appeals from the decision of the district court granting the appellees' motion to abstain, stay and/or dismiss proceedings which AAR had brought against Vacances Heliades S.A. ("VH"). AAR also asks us to remand the case to the district court with instructions to deny VH's alternative motion to dismiss the action on grounds of forum non conveniens. For the reasons set forth below, we reverse and remand.

BACKGROUND

AAR leased a Boeing 737-3Q8 aircraft to VH for a term of 96 months pursuant to an Aircraft Lease Agreement in May of 1998. Shortly thereafter, VH subleased the plane to Nimelias Enterprises S.A., who in turn sub-subleased it to Princess Airlines. VH and Nimelias have assigned to AAR their rights under the sublease and subsublease, respectively. On November 23, 1998, AAR contracted to sell its rights in the plane, the lease, the sublease, and the subsublease to First Security Bank as owner trustee for the benefit of TA Air X Corp. However, on October 28, 1999, First Security Bank and TA Air X Corp. assigned and transferred back all such rights to AAR.

On August 23, 1999, First Security[1] provided defendants with written notice asserting that they were in default of their obligations under the various lease and sublease agreements in several respects. Specifically, AAR claimed that the defendants had violated the lease by: (1) permitting delinquent EuroControl charges of approximately Euro

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[1] AAR claims that it sent this notice together with First Security, but VH claims that First Security sent it with a carbon copy to TA Air but that the notice "on its face does not appear to have been communicated to AAR." However, VH does state that the later notice of termination of lease was sent by First Security and signed by a representative of AAR.

700,000 to accrue on the plane;[2] (2) failing to keep the plane in serviceable condition by allowing an engine to be taken off-wing and to remain unserviceable for over one year and by failing to take required steps to enable the engine to be repaired and maintained; and (3) failing to pay variable rent under the lease for July, 1999. As a further response to these alleged acts of default, AAR and First National provided the defendants with written notice of termination of the lease on September 7, 1999.

VH claims that AAR failed to fulfill some of its obligations under the lease before it sent notice of the defendants' alleged default, and that at least one of the actions that AAR characterizes as an act of default was caused by AAR's prior breach. Specifically, AAR notes that the lease obliged AAR to deliver the plane "fresh from a Boeing Maintenance Planning Document C-7 check (overhaul) with all CPCP tasks current and completed." VH claims that the C-7 overhaul inspection "makes the [a]ircraft airworthy for at least 8,000 flight hours."[3] However, VH claims that the

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[2] EuroControl is the European Organization for the Safety of Air Navigation. AAR claims that, by November 4, 1999, EuroControl had asserted a lien against the plane to secure unpaid EuroControl route charges plus interest in the amount of Euro 1,284,606,22 and had sued Princess to recover this amount. AAR also asserts that it paid EuroControl in order to recover possession of the plane, to discharge the lien, and to terminate litigation over the lien, and that the defendants have refused to reimburse AAR for the payment.

[3] This contention is hotly disputed by AAR, which notes that the lease expressly provides that the plane was leased in an "as is" condition and that VH bore the risk of any mechanical problems with the plane, including the engine. AAR contends that such agreements are the standard custom and practice in the aircraft leasing industry. While AAR concedes that the leased obliged it to deliver the plane "fresh from a C-7 inspection," it denies that this obligation included a warranty that the aircraft would remain airworthy for any specified period of time (much less 8,000 flight hours), or that the engine would not develop mechanical problems before any specified number of flight hours. Indeed, AAR claims that the C-7 inspection was strictly an airframe inspection which did not entail any examination or warranty of the engines.

plane's engines began to develop technical problems after about 3,500 flight hours, and that a subsequent maintenance check revealed that one of them was in need of immediate and extensive repairs. VH asserts that it needed certain maintenance records to perform the required repairs, including video boroscopes of the engine which the lease had required AAR to perform before delivering the plane to VH. VH maintains that it contacted TA Air (which was at that time the owner-participant of the plane and of AAR's rights under the lease) and requested the maintenance records (including the boroscopes), but that the records could not be found. VH claims that after investigating the matter, it concluded that the boroscopes had not been completed. VH claims that it was unable to repair the engine without the required maintenance documents, and was therefore forced to take the engine off-wing and to replace it with a substitute engine, which it had leased from another company at a cost of $700,000. According to VH, TA Air consented in writing to the engine substitution on June 3, 1999. VH sent the original engine to an Israeli company for repairs.

On October 1, 1999, less than one month after First Security and AAR had sent the defendants its notice of termination of the lease, VH filed a complaint before the One Member First Instance Court of Athens, Greece against "AAR Corp.," (AAR's parent company, which AAR insists is a wholly separate legal entity from AAR), Transamerica Equipment Financial Services, and TA Air. VH alleged that AAR and TA Air had breached the lease and caused VH damages by failing to perform required maintenance and by failing to provide VH with the information necessary to repair the engine. VH asserted that the defendants' termination of the lease was "invalid, improper and fraudulent" because: (1) it came from the owner trustee of the aircraft (First Security) rather than from the owner-participant (TA Air); and (2) it was "supported on non-existent and unfounded grounds, which have been created by those who have made the termination." (That is, VH claimed that AAR and TA Air were themselves keeping the engine off-wing, and therefore keeping

the plane out of serviceable condition, by refusing to turn over the records needed to make the repairs.) The complaint sought the arrest of AAR's assets in Greece (including the plane)[4] as security for VH's damage claims, an order prohibiting the deregistration and departure of the aircraft from Greece, and the maintenance of the status quo until a hearing on the merits of VH's damage claims.

On October 8, 1999 AAR Corp. and TA Air filed handwritten responses with the Greek court. AAR Corp. denied that the arrest of its assets and of the aircraft was necessary, arguing that it was a publicly traded corporation with significant assets, and that therefore VH was exposed to no financial risk. AAR Corp. also argued that it should be free of any legal liability because AAR's rights in the lease were assigned to TA Air at the time that the engine failure occurred, and because the contract expressly provided that the plane was leased "as is" with no warranty. On October 11, 1999 the Athens court issued a brief handwritten provisional order prohibiting the deregistration and departure of the plane pending a subsequent hearing, which was set for November 11, 1999. At the November 11 hearing, counsel for the parties appeared and presented arguments. AAR claims that during the hearing, its local counsel orally argued that AAR was a separate entity from AAR Corp., that only the former was a party to the lease, and that VH had therefore named the wrong party in its complaint. On November 15, 1999, the court reaffirmed and extended the October 11th provisional order pending a final decision on the merits. On November 15, TA Air filed a written objection to the November 11 order, in which it argued that AAR, Corp. and AAR International, Inc. were separate entities. On October 28, 1999 TA Air transferred back its interest in the plane and the lease to AAR.

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[4] VH claims that it sought the arrest of AAR's assets in Greece and of the aircraft as security for its claims for damages stemming from AAR's alleged breach of the Lease. AAR disputes this characterization.

On November 22, VH filed a second action against "AAR, International Inc. Corp." and TA Air in the Multi Member First Instance Court in Athens (the "second Athens action"). This time, VH sought substantial damages for costs arising out of the failure of the original engine. Specifically, VH claimed $3.9 million to cover the cost of leasing a replacement engine, plus approximately $200,000 to cover late fees and a lost security deposit in connection with that leasing. VH's theory of recovery in the second Athens action was that AAR breached the lease by failing to perform the required video boroscopes on the engine before delivery, by failing to deliver the engine in working condition for 8,000 flight hours, and by failing to provide VH with the maintenance records necessary to repair the original engine. The damages sought covered the period from the filing of the first action on October 1, 1999 to the date of the filing of the second action. The Greek court set a court date for December 14, 2000. The parties dispute what was to occur on this date; VH claims that the case was "set for trial" on that date, while AAR contends (through the affidavit of its Greek attorney) that the December 14 date was for a preliminary hearing only, that no witness examination or discovery was scheduled to occur until after that date, and that no trial would likely occur for several years.

On December 13, AAR filed suit against VH, Nimelias, and Princess (the "appellees") in the Northern District of Illinois, seeking damages for the defendants' breach of the lease. The asserted grounds for the suit were identical to those stated in the written notice of default (namely, that the appellees had allowed the engine to go off-wing, that they had allowed EuroControl liens to accrue, and that they had failed to pay variable rent on the plane for July, 1999.) The complaint asserted that these acts of default justified AAR in terminating the lease in September, 1999. AAR sought damages in excess of $21 million to cover costs of returning the plane or of any engine to the United States, and of restoring the plane to airworthy condition. AAR also sought

reimbursement for the EuroControl charges that it claimed it was forced to pay on Princess' behalf.

On January 25, 2000 the Athens court issued a written decision in the first Athens action under the title "Provisory Measures Procedure." After concluding that Greek law applied to the action, the court found several facts to be "probable" in light of its consideration of witness testimony, oral arguments, documents, and written submissions presented by the parties during the November 11 hearing. For example, the court found it probable that AAR Corp. and AAR are the same legal person, and that AAR Corp. failed to deliver the aircraft with its engines properly maintained, forcing VH to lease a replacement engine in order to continue operating the aircraft, thereby incurring expenses of 221,000.000 Greek Drachmae. The court also found that the aircraft appeared to be AAR Corp.'s "sole negotiable asset," and that the situation regarding AAR Corp.'s assets was "doubtful, creating a financial risk for [VH] as per the satisfaction of its requirements." The court then held that these provisional findings supported VH's requested "safety measure of conservatory seizure for 221,000 Grd against [AAR Corp.]" plus an additional 29,000 Grd in interest and fees. The court then ordered "the conservatory seizure of any movable or real estate of [AAR Corp.]" and of the aircraft "in order to ensure [VH]'s claim against [it] . . . up to the amount of 250,000 Grd." The court also expressly allowed AAR Corp. to cancel (or if the seizure had already been enforced, to replace) the seizure by providing the Court's Secretarial Service with a bank guarantee in the form of an irrevocable line of credit in the same amount from a creditable bank operating in Greece.[5]

The parties provide differing characterizations of the purpose and effect of the first Athens action. VH describes

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[5] The court also found that VH's claims against the other defendants (Transamerica and TA Air) "do not appear to be proven."

the first Athens action as an emergency action seeking the seizure (or arrest) of the aircraft to guarantee that there would be assets available to satisfy a judgment that VH may obtain against AAR, and seeking an assessment of those damages. VH asserts that the "findings" made by the Athens court on January 25 are not provisional, and in support of this proposition it provides an affidavit of its Greek attorney which states that it is extremely rare where the Multimember First Instance Court of Athens will overturn the findings of the Emergency Court. Conversely, AAR presents the testimony of its own Greek attorney, who states by affidavit that under applicable Greek law and procedure, the First Athens action was provisional in nature, and nothing adjudicated therein constitutes a finding of fact or law for any purpose. Further, he asserts that the order entered by the Athens court on October 11, 1999 was meant only to protect the status quo ante until hearing on the petition, and that the November 11 order likewise only maintained in effect the prior order pending a judgment. Furthermore, AAR's Greek lawyer states that the Greek court did not need to have personal jurisdiction over any of the defendants in order to issue such provisional relief, and that no ruling in the first Athens action operates as a finding that the Athens court has jurisdiction over the defendants or that such defendants have been formally served with process (other than by telegram). Finally, he asserts that the January 25, 2000 order in the first Athens action constituted only a temporary arrest (or attachment) of the aircraft and a provisional order prohibiting the deregistration and departure of the Aircraft pending the final resolution of VH's claims.

Subsequently, VH instituted two additional related actions in the Greek courts. After AAR posted the bank guarantee and attempted to remove the plane from Greece on February 4, 2000, VH filed another emergency proceeding (the "third Athens action"). Like the first action, this action sought the immediate seizure of the aircraft as well as a prohibition against the deregistration and departure of the plane until a final and unappealable decision is issued (and in any case

until the engine is repaired). It also sought the attachment of all of "AAR International Corp."'s assets in Greece, and a provisional order prohibiting the deregistration or take-off of the aircraft, as well as any other action which might change the actual and legal status of the plane and or any other assets of the defendant. The purpose of this action was to secure potential recovery under the second Athens action, that is, it was a request for temporary relief pending the outcome of that action in order to ensure that "AAR International Corp." had sufficient assets available to cover any potential damages awarded against it in the second action.

On February 7, 2000, the Athens Court granted VH the relief it sought in the third action, and again ordered the seizure of the aircraft and provisionally prohibited its deregistration or departure. Once again, the court provided that the plane would be allowed to be deregistered and removed from Greece if AAR posted a bank guarantee in the amount of 250,000 Grd. AAR posted the bank guarantee shortly thereafter, and removed the plane from Greece. In addition, VH filed a fourth action in Athens, which it describes as a continuation or renewal of the first Athens action. VH claims that, under Greek law, it was obliged to file the fourth, "non-emergency" action in order to recover any damages from AAR and to maintain in force all of the orders and decisions given according to the emergency procedure. VH asserts that the fourth Athens action is "exactly the same case" as the first Athens action, except that it is filed according to "ordinary" or "non-emergency" procedures.

In the federal action, the appellees moved the district court to abstain under the *Colorado River* doctrine in light of the pending Greek actions, or in the alternative, to dismiss the action on grounds of *forum non conveniens*. Finding that the American action was parallel to the ongoing Greek litigation and that the *Colorado River* factors favored abstention, the district court granted the appellees' motion to abstain. The

court did not address the *forum non conveniens* issue. AAR appealed.

DISCUSSION

A) Abstention

Federal courts have a "virtually unflagging obligation" to exercise the jurisdiction conferred on them by Congress. *Colorado River Water Cons. Dist. v. United States,* 424 U.S. 800, 817(1976). Nevertheless, in "exceptional" circumstances, a federal court may abstain from hearing a suit and "await the outcome of parallel proceedings as a matter of 'wise judicial administration, giving regard to the conservation of judicial resources and comprehensive disposition of litigation.'" *Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.,* 180 F.3d 896, 898 (7th Cir. 1999) (quoting *Colorado River*, 424 U.S. at 817). However, because the federal courts have a "heavy obligation" to exercise jurisdiction, "only the clearest of justifications will warrant dismissal" of the federal action in deference to a concurrent state proceeding in the name of wise judicial administration *Colorado River,* 424 U.S. at 819, 820. Therefore, our task in determining whether abstention is appropriate is "not to find some substantial reason for the *exercise* of federal jurisdiction by the district court, . . . [but] rather . . . to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under Colorado River to justify the surrender of that jurisdiction." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 25-26 (1983). We review a district court's decision to abstain under *Colorado River* for abuse of discretion. *See Finova,* 180 F.3d at 898. However, to avoid reversal, a district court must exercise its discretion under the standards prescribed by *Colorado River*. That is, it must consider the factors listed in *Colorado River* and its progeny and determine whether in light of those factors exceptional circumstances exist warranting abstention. *See Moses H. Cone Mem'l Hosp.,* 460 U.S. at 19. If there is any substantial doubt that the parallel

litigation will be "an adequate vehicle for the complete and prompt resolution of the issues between the parties," it would be a "serious abuse of discretion" for the district court to stay or dismiss a case in deference to the parallel litigation. *Id.* at 28. Moreover, while the situation confronting a court on a motion to abstain "is somewhat different where, as here, the alternate forum is not the tribunal of a state of the federal union to which, under our Constitution, we owe a special obligation of comity," we apply the same general principles with respect to parallel proceedings in a foreign court in the interests of international comity. *Finova*, 180 F.3d at 898 (citing *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 685 (7th Cir. 1987) (internal quotation omitted)).

In evaluating the propriety of the district court's decision to abstain under *Colorado River*, we must first determine whether the federal and foreign proceedings are parallel. *See Finova*, 180 F.3d at 898 (citing *Caminiti & Iatarola, Ltd. v. Behnke Warehousing, Inc.*, 962 F.2d 698 (7th Cir. 1992)). This is a legal issue which we review *de novo*. *See Property & Cas. Ins. Ltd. v. Central Nat'l Ins. Co. of Omaha*, 936 F.2d 319, 321 (7th Cir. 1991) (citations omitted); *Ryan v. Johnson*, 115 F.3d 193, 196 (3d Cir. 1997) (citation omitted). If the actions are not parallel, the *Colorado River* doctrine does not apply. *See Interstate Material Corp. v. City of Chicago*, 847 F.2d 1285, 1287 (7th Cir. 1988). Suits are parallel if "substantially the same parties are litigating substantially the same issues simultaneously in two fora." *Schneider Nat'l Carriers, Inc. v. Carr*, 903 F.2d 1154, 1156 (7th Cir. 1990). Suits need not be identical to be parallel, *see Caminiti*, 962 F.2d at 700, and the mere presence of additional parties or issues in one of the cases will not necessarily preclude a finding that they are parallel. *See id.* at 701; *Lumen Constr., Inc. v. Brant Constr. Co., Inc.*, 780 F.2d 691, 695 (7th Cir. 1985). The question is not whether the suits are formally symmetrical, but whether there is a "substantial likelihood" that the foreign litigation "will dispose of all claims presented in the federal case." *Day v. Union Mines Inc.*, 862 F.2d 652, 656 (7th Cir. 1988) (quoting *Lumen*, 780 F.2d at 695).

The district court found that the federal action and the Greek actions were parallel. The court reasoned that:

> [t]here is a substantial likelihood that [the Greek] cases will dispose of all the issues in the federal litigation because a single member of the Greek court, which normally sits as a panel of three, has found on an emergency hearing that AAR is liable to the defendants here (overlapping with some of the plaintiffs there) and has ruled in a preliminary way on damages.

The court also found that AAR had offered "no plausible reason to think that this ruling will be reversed by the full panel," and stated that "if there will be anything more to litigate in this matter than liability and damages, AAR does not explain what it is." Finally, the district court concluded that if the ruling of the Greek judge is upheld, "that would probably end the matter," because the ruling would be entitled to recognition and would have preclusive effects over the claims brought in the federal action.

AAR challenges the district court's finding on several grounds,[6] but we can resolve the matter by addressing only one. AAR maintains that the claims that it brought in the federal case are distinct from and independent of the claims brought in the second Athens action, and that therefore it is unlikely that the second Athens action will dispose of them. In support of this argument, AAR points to section 1E of the lease, which provides in relevant part:

> Lessee will pay all Base Rental, Variable Rental, Supplemental Rental, costs, charges, fees and expenses in connection with the use, possession and operation of the Aircraft, including maintenance,

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[6] For example, AAR argues that it was not a party to any of the Greek actions, and that therefore those actions are not parallel to the federal action. While we do not decide the issue, we assume throughout the opinion that AAR was a party to the Greek litigation.

> insurance, state, local, provincial and all other taxes, and risk of loss or other casualty. Such obligations of Lessee will be paid in full and will be absolute and unconditional under any and all circumstances and regardless of other events, including any of the following: (a) Any right of set-off, counterclaim, recoupment, defense or other right (including any right of reimbursement) which Lessee may have against Lessor . . . including any claim Lessee may have for the foregoing. (b) Unavailability or interruption in the use of the Aircraft for any reason, including . . . any defect in airworthiness, merchantability, fitness for any purpose, fitness, design . . . . (d) Invalidity or unenforceability . . . or other defect in this Lease. (e) Failure or delay on the part of any party to perform its obligations under this Lease. (f) Other cause which but for this provision would or might have the effect of terminating or in any other way affecting any obligation of Lessee hereunder.

AAR urges that, according to this provision of the lease, the appellees' obligation to pay rent, to keep the aircraft in operational condition, and to discharge any liens against the aircraft--which is the focus of the federal claim--is absolute and unconditional, and is not subject to any claims and defenses that VH may have against AAR. AAR notes that VH's obligations under this provision were not and are not at issue in any of the Greek actions, and that therefore no ruling in those actions could have preclusive effect over AAR's claims in the federal action. Therefore, AAR argues that even if the Athens court has ruled in a preliminary fashion that AAR is liable to VH for damages resulting from the failure of the engine, it has not ruled that this breach by AAR excused the defendants from their independent duties. Indeed, AAR maintains that any such finding would flatly contradict the terms of section 1E of the lease.

We agree with AAR. On the facts presented, it does not seem substantially likely that the Greek actions will dispose of all of the claims presented in the federal suit. It is quite possible that AAR's claim that the appellees breached the lease by taking the engine off-wing will be disposed of in the Greek action, as such a claim would be precluded by a final judgment by the Greek court that AAR breached the contract and forced VH to remove the engine when it leased the aircraft with a defective engine.[7] However, AAR's other claims are not currently before the Greek courts in any of the Greek actions, and it does not seem likely that any of the Greek courts will resolve the legal and factual issues supporting those claims in deciding the claims actually before them. The only lease-based defense that AAR has put forward in any of the Greek actions is that under a separate section of the lease, the aircraft was leased on an "as is" basis with no warranties of any kind. It has not injected the issue of the interpretation of section 1E into any of the Greek litigation by way of either a defense or a counterclaim. Nor has AAR alleged in any of the Greek actions that the appellees failed to pay rent or to discharge any liens, or that the appellees had a duty to pay such expenses irrespective of any alleged breach on AAR's part. Neither AAR nor any of the appellees have sought a declaration of their rights under section 1E in any of the Greek actions. Therefore, even if the provisional rulings in the first and third Athens actions are upheld on appeal and VH prevails in the second Athens action as well, the appellees' obligations and potential liability under section 1E of the lease for failing to pay rent and to keep the aircraft free of liens will not have been decided. While we do not decide the issue and interpret section 1E, we cannot find AAR's argument that section 1E makes the appellees' duty to pay rent and to discharge liens absolute irrespective of any breach by AAR implausible as a matter of law. Given this, we cannot

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[7] Even this is uncertain, however. Because, if AAR prevails in the Greek actions, its claims against the appellees will not be resolved.

say that it is substantially likely that the issue will be disposed of in the Greek litigation. Because "it would be a serious abuse of discretion" to abstain under *Colorado River* if "there is any substantial doubt" "that the parallel . . . litigation will be an adequate vehicle for the complete . . . resolution of the issues between the parties," *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 28, and because any doubt regarding the parallel nature of the foreign suit should be resolved in favor of exercising jurisdiction, *see Allen v. Board of Educ., Unified Sch. Dist.* 436, 68 F.3d 401, 403 (10th Cir. 1995), we conclude that the federal and foreign actions are not parallel.

None of this is meant to signal a retreat from our holding in *Day*. In that case, we found that a claim brought in federal court by a group of former shareholders against the purchasers of their stock was parallel for *Colorado River* purposes to a pending state court action involving essentially the same parties, where the federal action turned on the interpretation of the *payment* provision of the stock purchase agreement which was the subject of the state litigation. *Day v. Union Mines, Inc.*, 862 F.2d 652, 655-57 (7th Cir. 1988). We found the federal and state suits to be parallel even though the particular issue presented in the federal claim--the interpretation of the payment provision of the stock purchase agreement--was not specifically raised in the state court proceeding. In the state action, the purchasers of the stock had claimed that the shareholders breached certain representations and warranties, thereby relieving the purchasers of their obligations under the stock purchase agreement. The state action therefore addressed the validity, enforceability, and interpretation of the entire stock purchase agreement, of which the payment provision was a part. Under these circumstances, we agreed with the district court's conclusion that the issue presented in the federal claim would be disposed of in the state litigation, regardless of which party prevailed in the state case. *See id.* at 656. We reasoned that if the purchasers won the state case, then the purchase agreement would be declared invalid *in toto*, and the shareholders would be left unable to enforce its payment provision against the

purchasers. We further surmised that if the shareholders won the state case, then this would constitute a finding by the state court that they were entitled to payment, and the state court would almost inevitably have to interpret the payment provision in order to determine the amount of payment that they could collect. Given this, we concluded that the issue presented in the federal action was premature, since it could not be resolved until the issue presented in the state action (the validity of the stock purchase agreement) was decided. Therefore, we found that the federal and state actions were parallel, and we ruled that "where the validity, enforceability and interpretation of a contract are at issue in both federal and state courts, and the state litigation was commenced first and has progressed substantially towards completion, entry of a stay does not under Colorado River constitute an abuse of discretion." *Id.*

We find this case to be distinguishable from *Day*. VH has not argued in any of the Greek actions that AAR's claimed breach invalidated the lease or excused VH from its lease obligations to pay rent and discharge liens against the aircraft. Rather, it seeks to hold AAR liable for breaching certain claimed warranties which would not necessarily implicate its own obligations under section 1E of the lease. Therefore, it is possible that VH could prevail in the Greek action without defeating all of AAR's claims in the federal action. In addition, it is not necessarily the case that the issue presented by VH in the foreign action must be resolved before the district court can rule on the claim presented in the federal action. While actions filed in separate fora alleging breaches of different provisions of the same contract may frequently be deemed parallel for *Colorado River* purposes, *see generally Evans Transp. Co. v. Scullin Steel Co.*, 693 F.2d 715 (7th Cir. 1982); *Microsoftware Computer Sys., Inc. v. Ontel Corp.*, 686 F.2d 531 (7th Cir. 1982) (*overruled on other grounds by Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988)); *Darsie v. Avia Group Int'l, Inc.*, 36 F.3d 743 (8th Cir. 1994); *Manley, Inc. v. Keystone Food Prods., Inc.*, 859 F.2d 80 (8th Cir.

1988), the presence of section 1E of the lease prevents us from drawing such a conclusion here.

Citing *Channell v. Citicorp Nat'l Services, Inc.*, 89 F.3d 379 (7th Cir. 1996), the appellees seem to argue that the Greek actions are parallel to the federal action because the claim brought by AAR in the federal action arises from the same "operative facts" as the claims brought in Greece, and therefore should have been pled as a compulsory counterclaim in the Greek actions. However, *Channell* addressed the scope of a district court's authority under 28 U.S.C. § 1367 to exercise supplemental jurisdiction over claims that form part of the same "case or controversy" under Article III of the Constitution, and not the standards for determining whether actions are parallel for purposes of *Colorado River* abstention. *Channell* is therefore inapplicable here. Moreover, in concluding that an automobile lessor's counterclaim seeking contractual termination payments against lessees who had brought an action for violation of the Consumer Leasing Act was sufficiently connected to the lessees' claims (under § 1367's liberal standards) to allow the court to assert jurisdiction over the counterclaims, we were careful in *Channell* to note that the lessees' claims and the lessor's counterclaims were based on the same clause of the lease, and that the basic issues were integral to the lessees' case even before the counterclaim was brought. *See id.* at 385-86. As has been noted, AAR's federal claim does not bear a similar relationship to the Greek claims.

Nevertheless, it could be argued that a claim brought in a federal action based on a claim which would be a compulsory counterclaim in a pending foreign action might make the federal action "parallel" to the foreign action, because the federal claim would be "disposed of" in the foreign action in one way or another. (That is, it would either be asserted as a counterclaim in the foreign action and decided there, or lost if not asserted before the conclusion of the foreign action. Either way, conclusion of the foreign litigation would leave nothing left for the federal court to decide.) However, the appellees

point to no authority (nor have we found any) suggesting that a federal action is parallel to a state or foreign action for *Colorado River* abstention purposes when the claim upon which the federal action is based is pleadable as a compulsory counterclaim in the other action. Moreover, it is unclear that Greece has a compulsory counterclaim rule analogous to FED. R. CIV. P. 13(a). VH submitted the affidavit of its Greek lawyer, which states that Greek law provides for the filing of counterclaims either in the original action or in a separate procedure, and that "if a party choose [sic] the way of separate procedure," then the Greek court has the power to unify the claim with the original procedure. Moreover, the affidavit states that "claims not asserted in any of the current proceedings or not presented on time even in a separate procedure (which will be unified with the existing procedures as . . . mentioned above[)] . . . or before the current proceedings are concluded, will be lost."[8] From the affidavit, it is not clear whether a Greek court's "unifying" of counterclaims brought in separate proceedings with the original proceeding is mandatory or discretionary. Thus it is not clear that counterclaims neither filed in the original action nor unified with that action before the decision is reached will be "lost."

In addition, even if we were to conclude that either of the Greek actions were parallel to the federal action, we would not affirm the district court's decision to abstain in this case. Once a district court determines that the federal action and the foreign action are parallel, its next task is "to balance the considerations that weigh in favor of, and against, abstention, bearing in mind the exceptional nature of the measure." *Finova,* 180 F.3d at 898. One of the ten factors that the court must consider is the relative inconvenience of the federal forum. *See id.* In considering this factor, the district court placed undue weight on the inconvenience of the federal

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[8] AAR's Greek lawyer submitted an affidavit denying that Greece has a compulsory counterclaim rule.

forum for the appellees, and did not adequately consider the inconvenience of the Greek forum for AAR. The court took judicial notice that the law firm representing AAR "advertises itself as a global law firm . . . and is presumably able to litigate even in Athens." Putting aside the district court's rather unorthodox use of judicial notice, we find that the court erred in considering the law firm's ability to litigate in Athens as part of the "convenience" calculus. The proper inquiry is the relative inconvenience of the competing fora to the parties, not to their lawyers. Moreover, the district court did not even consider section 20B of the Lease, which provides that the appellees "irrevocably consent" to non-exclusive jurisdiction in Illinois and "irrevocably waive any claim that any such suit, action or proceeding brought in any court in or of the State of Illinois has been brought in an inconvenient forum." While we reject AAR's argument that section 20B bars VH's entire abstention claim (because an abstention motion is not the same as an objection to venue on grounds of inconvenience, and inconvenience to the parties is only one of the many factors that a district court weighs in deciding whether to abstain), we do find that this provision of the lease is relevant to the convenience analysis and should have been weighed by the court. The court should have determined whether section 20B precluded the defendants from objecting to the inconvenience of venue in Illinois altogether, therefore ceding the inconvenience factor of the abstention analysis to AAR. At the very least, this error would require us to remand to the district court for reconsideration, even if we found the Greek and the federal litigation parallel.

B) ***Forum non conveniens***

AAR also asks us to remand this case to the district court with instructions to deny VH's motion to dismiss the federal action on grounds of *forum non conveniens*. The appellees brought their *forum non conveniens* motion before the district court as an alternative to their abstention motion, but the district court did not address it, presumably deeming it mooted by its decision to abstain the action. AAR now asks us

to decide the merits of the motion in its favor. The appellees object that because the district court did not rule on this matter, there is nothing for us to review.

As a general rule, an appellate court may not consider an issue not passed on below. *See Singleton v. Wulff,* 428 U.S. 106, 120 (1976). However, this rule is subject to certain limited exceptions. For example, an appellate court may resolve an issue not decided by the district court where "the proper resolution [of that issue] is beyond any doubt." *See id.* at 121 (citing *Turner v. City of Memphis,* 369 U.S. 350 (1962)). "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton,* 428 U.S. at 120. In exercising this discretion, we have resolved issues which were not resolved below where, *inter alia*, "both parties have briefed and argued [the issue's] merits," and where "the benefit of a district court hearing is minimal because proper resolution of the issue is clear." *United States v. Brown,* 739 F.2d 1136, 1145 (7th Cir. 1984). *See also Otto v. Variable Annuity Life Ins. Co.,* 814 F.2d 1127, 1137-38 (7th Cir. 1986) (deciding a summary judgment motion raised below but not reached by the district court "in the interests of judicial economy," where the parties had a "full and fair opportunity to argue all relevant aspects of the . . . issue" before both the district and the appellate courts, and where the correct resolution of the issue was clear).

AAR argues that the proper resolution of this issue is beyond any doubt (therefore making it a candidate for resolution on appeal) because section 20B of the lease provides that the appellees irrevocably consent to the non-exclusive jurisdiction of the Illinois federal and state courts, and irrevocably waive any objection to the venue of any action brought in Illinois as well as any objection that any such action has been brought in an inconvenient forum. AAR notes that we have held that when parties freely negotiate a forum selection clause, the clause is to be enforced in

accordance with its terms except in exceptional circumstances, *see Bonny v. Society of Lloyd's,* 3 F.3d 156, 159-61 (7th Cir. 1993), and that the appellees have identified no such circumstances here. The appellees counter that, while they do not dispute the enforceabilty of section 20B's forum-selection clause, such clauses are not dispositive of a court's decision to grant or deny a motion to dismiss based on forum non conveniens. Citing *Comedy Partners v. Street Players Holding Corp.,* 34 F. Supp. 2d 194, 197 (S.D.N.Y. 1999) and *Finova*, the appellees contend that courts entertaining such motions may properly weigh concerns such as systematic integrity, judicial economy and comity, and are not bound by any agreement between the parties not to object to venue on grounds of inconvenience. Moreover, the appellees note that the forum selection clause at issue in this case provides for *concurrent, non-exclusive* jurisdiction in Illinois state and federal courts, and therefore by its terms does not purport to make Illinois the mandatory or exclusive forum for adjudicating disputes over the contract. Therefore, even if the existence of a mandatory forum selection clause were wholly dispositive of the issue (which the appellees deny), this rule would be of no help to AAR.

Before we can determine whether the resolution of this issue is sufficiently clear to permit us to decide it instead of remanding it, we need to determine what legal standards govern a court's analysis of a motion to dismiss on *forum non conveniens* grounds when the parties have agreed to a forum selection clause like the one in this case. The usual *forum non conveniens* analysis (that is, the analysis applicable to cases not involving forum selection clauses) consists of a two-step inquiry. The court must first determine that an adequate alternative forum is available to hear the case, meaning that all parties are within the jurisdiction of the alternative forum and amenable to process there, and that the parties would not be treated unfairly or deprived of all remedies if the case were litigated in the alternative forum. *See Kamel v. Hill-Rom Co., Inc.,* 108 F.3d 799, 802-03 (7th Cir. 1997). If the court finds that such an adequate alternative forum exists, then the court

must proceed to weigh a host of private interest factors (for example, the "relative ease of access to sources of proof" in each forum, and "the availability of compulsory process for the attendance of unwilling witnesses"), and public interest factors (for example, "administrative difficulties stemming from court congestion," and the interest of trying a diversity case in a forum that is "at home with the law that must govern the action.") *Id.* at 803. Moreover, under the usual analysis, there is "a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." *See Macedo v. Boeing Co.*, 693 F.2d 683, 688 (7th Cir. 1982) (citations omitted), and this is particularly true where a domestic plaintiff has filed suit in his own home forum. *See id.; see also Kamel,* 108 F.3d at 803.

However, some of our sister circuits have suggested that where the parties to an international dispute have agreed to a mandatory forum selection clause, the usual *forum non conveñiens* analysis no longer applies, and the only question remaining for the district court to determine is whether the forum selection clause is enforceable under the standards set forth in *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). *See Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V.*, 145 F.3d 505, 509-10 (2d Cir. 1998) (suggesting that a district court should first apply the Bremen standards to determine whether the forum selection clause was enforceable, and should only reach the defendant's motion to dismiss on *forum non conveniens* grounds if it finds that the parties did not form a contract containing a forum selection clause); *Cf. Mitsui & Co. (USA), Inc. v. Mira M/V,* 111 F.3d 33, 37 (5th Cir. 1997) (rejecting appellant's challenge to the enforcement of a mandatory forum selection clause for reasons of forum non conveniens, and stating that "increased cost and inconvenience are insufficient reasons to invalidate foreign forum-selection or arbitration clauses."); *but see Royal Bed & Spring Co., Inc. v. Famossul Industria e Comercio de Moveis LTDA.*, 906 F.2d 45, 51 (1st Cir. 1990) (ruling that a forum

selection provision is not dispositive of a motion to dismiss on *forum non conveniens* grounds, but rather is "simply one of the factors that should be considered and balanced" in the ordinary forum non conveniens analysis.) In *Bremen*, the Court ruled that a freely negotiated mandatory forum selection clause is enforceable unless the party challenging its enforcement can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching," or that "trial in the [chosen] forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court."[9] Applying these standards together with standards articulated in later Supreme Court cases, we have ruled that a forum selection clause is presumptively valid and enforceable unless (1) "[its] incorporation into the contract was the result of fraud, undue influence, or overweening bargaining power; (2) the selected forum is so gravely difficult and inconvenient that [the complaining party] will for all practical purposes be deprived of its day in court; or (3) [its] enforcement . . . would contravene a strong public policy of the forum in which the suit is brought, declared by statute or judicial decision." *Bonny*, 3 F.3d at 160 (internal citations and quotation omitted).

Nevertheless, it can be argued that the *Bremen* and *Bonny* standards should not control in this case, for as VH notes, the forum selection clause in the Lease agreement is permissive, not mandatory. (That is, it provides that suit *may* be brought in Illinois as well as in other jurisdictions, but does

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[9] We have also noted that "the only good reason for treating a forum selection clause differently from any other contract . . . is the possibility of adverse effects on third parties," and have ruled that where that possibility is slight, it should be treated like any other contract, *Northwestern Nat'l. Ins. Co. v. Donovan*, 916 F.2d 372, 376 (7th Cir. 1990), and should therefore be enforced "unless it is subject to any of the sorts of infirmity, such as fraud and mistake, that justify a court's refusing to enforce a contract." *Id.* at 375.

not mandate that suit must be brought exclusively in Illinois.) At least one circuit has held that the traditional *forum non conveniens* analysis (rather than the stricter scrutiny required by *Bremen*) applies in cases involving permissive forum selection clauses. *See Blanco v. Banco Industrial de Venezuela, S.A.*, 997 F.2d 974, 979-80 (2d Cir. 1993). This conclusion seems reasonable. However, in this case we have more than merely a permissive forum selection clause; we have such a clause plus unambiguous language providing that the lessee shall not object to venue in an Illinois state or federal court on the ground that such a court is an inconvenient forum. We have held that by agreeing to a mandatory forum selection agreement, a party waives objections to venue in the chosen forum on the basis of cost or inconvenience to itself. *See Northwestern Int'l*, 916 F.2d at 375, 378 (7th Cir. 1990). It would seem incongruous to conclude that a party does not similarly waive such objections when he agrees to a permissive forum selection clause which specifically provides for the waiver of convenience-based objections to suits brought in a particular venue. *See generally Blanco*, 997 F.2d at 979 (deciding to apply the traditional *forum non conveniens* analysis rather than the *Bremen* standards where the forum selection clause at issue was permissive and did not include either the defendant's irrevocable consent to suit in designated fora or the defendant's waiver of *forum non conveniens* objections). The forum selection clause and the waiver provisions at issue here were part of a lease that was freely negotiated between sophisticated international corporations. Whatever inconvenience VH would suffer by being forced to litigate in a court in Illinois was foreseeable at the time that it agreed to waive objections based on such factors. *See Bremen*, 407 U.S. at 17-18. Under these circumstances, we conclude that the stricter standards announced in *Bremen* and *Northwestern Int'l* should control the analysis of the appellees' *forum non conveniens* motion.[10]

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[10] The appellees rely on *Comedy Partners* for the proposition that a

Therefore, the appellees' *forum non conveniens* motion must fail unless they can demonstrate one of the three factors set forth in *Bonny*. This they cannot do, because they have effectively conceded the enforceability of the lease's forum selection clause. When confronted with AAR's argument that the forum selection clause and its waiver provisions should control the disposition of its *forum non conveniens* motion, the appellees argued only that cases like *Bonny* are inapposite, that the forum selection clause was permissive rather than mandatory, and that contractual agreements not to object to venue on grounds of convenience are not dispositive of *forum non conveniens* motions. Although AAR cited *Bonny* and argued that the appellees had not established that any of its three factors were present in this case, the appellees merely asserted that *Bonny* was inapplicable and did not argue in the alternative that the forum selection clause and its waiver provisions were unenforceable under Bonny. In effect, the appellees have premised their entire argument regarding *forum non conveniens* on the assumption that the standards set forth in *Bonny* and *Bremen* do not control the *forum non conveniens* inquiry in this case. We have rejected that assumption, and unfortunately for the appellees, they have waived any argument that the forum selection clause is unenforceable.

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permissive forum selection clause containing irrevocable consent to suit in a particular forum plus a waiver of *forum non conveniens* objections is not "binding on the court" and is not dispositive of a *forum non conveniens* motion. However, *Comedy Partners* did not involve a motion to dismiss on grounds of *forum non conveniens*. Rather, it involved a motion to dismiss pursuant to the "first filed rule," which is more analogous to an abstention motion than a *forum non conveniens* motion. As we have noted, a contractual agreement not to object to the inconvenience of a particular venue is not dispositive of an abstention motion. Moreover, the statements in *Comedy Partners* regarding the effect of a contractual agreement not to object to venue upon a motion to dismiss the action in deference to an earlier filed suit is *dicta*. The court actually held that the party challenging the dismissal could not rely on the alleged contractual agreement not to object to venue, because its substantive claim was premised on a denial that the contract existed in the first place.

Therefore, since the *forum non conveniens* issue was fully briefed by both of the parties on appeal, the resolution of the issue is clear, and the dispositive issue (the enforceability of the forum selection clause) is a question of law which we review *de novo, see Bonny,* 3 F.3d at 159 (citations omitted), we conclude that nothing would be gained by remanding this issue to the district court for further consideration. *See Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 749-50 (7th Cir. 1993); *Bruneau v. FDIC*, 981 F.2d 175, 178-79 (5th Cir. 1992). Accordingly, we hold that appellee's motion to dismiss on grounds of *forum non conveniens* should be denied.

CONCLUSION

For the foregoing reasons, we REVERSE the district court's decision to abstain and REMAND with instructions to vacate the dismissal order and to deny the appellees' motion to dismiss on grounds of *forum non conveniens*.

REVERSED and REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C:
JUDGMENT IN A CIVIL CASE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, DATED AND FILED JUNE 13, 2000

United States District Court
Northern District of Illinois
Eastern Division

AAR International, Inc.

v.

Vacances Heliades S.A., et al.

JUDGMENT IN A CIVIL CASE
Case Number: 99 C 8090

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to heating before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that defendants' motion to abstain and dismiss the case without prejudice is granted.

Michael W. Dobbins, Clerk of Court

/s/ Matthew P. John

Matthew P. John, Deputy Clerk

Date: 6/13/2000

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Elaine E. Bucklo	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	99 c 8090	DATE	6/13/2000
CASE TITLE	AAR International, Inc. vs. Vacances Heliades, et al.		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.]

(2) ☐ Brief in support of motion due _____.

(3) ☐ Answer brief to motion due _____. Reply to answer brief due _____.

(4) ☐ Ruling/Hearing on _____ set for _____ at _____.

(5) ☐ Status hearing [held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(6) ☐ Pretrial conference [held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) ☐ Trial [set for/re-set for] on _____ at _____.

(8) ☐ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) ☐ This case is dismissed [with/without] prejudice and withut costs [by/agreement/pursuant to]
☐ FRCP4(m) ☐ General Rule 21 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2)

(10) ■ [Other docket entry] Defendants' motion to abstain and dismiss the case without prejudice is granted. If there is anything to litigate in this matter that is not precluded when the Greek courts are done with it, AAR may file again. Any pending motion in this case is terminated as moot. Any schedule set in this case is also vacated. Enter Memorandum Opinion and Order.

(11) ■ [For further detail see order attached to the original minute order.]

	No notices required, advised in open court.		2 number of notices	Document Number
	No notices required.			
√	Notices mailed by judge's staff.		date docketed	
	Notified counsel by telephone.		docketing deputy initials	
	Docketing to mail notices.		6/13/2000 date mailed notice	
√	Mail AO 450 form.			
	Copy to judge/magistrate judge.		MPJ	
MPJ	courtroom deputy's initials	Date/time received in central Clerk's Office	Mailing deputy initials	

C-2

APPENDIX D:
MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, DATED AND FILED JUNE 13, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AAR INTERNATIONAL, INC., Plaintiff,	)	
v.	)	No. 99 C 8090
VACANCES HELIADES S.A. NIMELIAS ENTERPRISES S.A., and PRINCESS AIRLINES S.A., Defendants.	)	

MEMORANDUM OPINION AND ORDER

In 1998, AAR International ("AAR") leased an airplane to Vacances Heliades and Nimelias Enterprises (the "defendants").[1] A dispute arose about the satisfaction of the parties' obligations under the lease, and Vacances filed a

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[1] AAR International is an Illinois corporation with its principle place of business in this state; Vacances Heliades is a French corporation with its principal place of business in France, and Nimelias Enterprises, is a Cypriot corporation with its principal place of business also in France.

lawsuit in the First Instance Court of Athens, Greece, against AAR, Transamerica Equipment Financial Services and TA Air X Corporation, alleging breach of the lease. On November 22, 1999, Vacances filed a second case in Athens seeking damages for the alleged breach. In addition, AAR's lawyer states that there is a third Athens action that he is defending. On December 13, 1999, AAR filed this alienage action I now consider in the Northern District of Illinois. The defendants move that I abstain. I grant the motion and dismiss the case without prejudice.

I.

I have a "virtually unflagging obligation" to exercise the jurisdiction conferred on me by Congress, but in exceptional cases, I should stay or dismiss a suit and await the outcome of parallel proceedings as a matter of "wise judicial administration, giving regard to the conservation of judicial resources and comprehensive disposition of litigation." *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976) (internal citation omitted). Federal courts usually grapple with abstention in the context of parallel state court proceedings. Here, the alternate forum is not the tribunal of "a state of the federal union to which, under our Constitution, [I] owe a special obligation of comity." *Ingersoll Milling Mach. Co. v. Granger,* 833 F.2d 680, 685 (7th Cir. 1987). Nevertheless, in the interests of international comity, I apply the same general principles with respect to parallel proceedings in a foreign court. *Finova Capital Corp v. Ryan Helicopters U.S.A., Inc.,* 180 F.3d 896, 898 (7th Cir. 1999).

I first determine whether the federal and foreign proceedings are parallel. *Caminiti & Iatarola, Ltd. v. Behnke Warehousing, Inc.,* 962 F.2d 698, 700 (7th Cir. 1992). They are if substantially the same parties are litigating substantially the same issues simultaneously in two fora. *Schneider Nat'l Carriers, Inc. v. Carr,* 903 F.2d 1154, 1156 (7th Cir. 1990). AAR argues that the plaintiff here is " AAR International, "

while the defendant in the first Athens action is "AAR Corp." and, in the second, "AAR International, Inc. Corp," which, AAR says, does not exist. The Greek court, however, found that AAR Corp. and AAR International, Inc. are "one and the same legal person," Decision No. 762/2000, January 25, 2000. AAR asks me to hold that this ruling has "no conceivable basis in law or fact." "Concerns of international comity" and "respect for the capacities of foreign . . . tribunals," *Mitsubishi Motors v. Soler Chrysler-Plymouth,* 473 U.S. 614, 629 *(1985),* would require me to reject this claim, and even if they did not, the basis would be provided by AAR's own conduct before the Athens Court, defending the first Athens action as AAR Corp. and arguing that it should not have had to post a bank guarantee because it was publicly traded.

The present defendants are right to characterize AAR's argument that " AAR International, Inc. Corp." the named defendant in the second Athens case, is not AAR, as fatuous. This is not an Article Nine security interest filing where the names have to be just right.[2] The "nonexistent" defendant seems to be defending the case just fine, and if it is different from AAR, AAR has not explained why.

The parties are the same. Are the causes of action? They need not be identical for proceedings to be parallel as long as there is a "substantial likelihood" that the foreign litigation "will dispose of all the claims presented in the federal case." *Lumen Constr. Inc. v. Brant Constr. Co.,* 780 F.2d 691, 695 (7th Cir. 1985). AAR contends that the issues in the Athens case differ because in the present case, AAR "is not seeking an order for possession or recovery of the Aircraft," while the first and third actions seek a temporary arrest or attachment of the aircraft and an order prohibiting its deregistration and

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[2] I note that AAR misspelled Vacances' name throughout as "Vacance"; it would not have been amused had Vacances replied that there was no such company.

departure, and the second Athens action seeks damages for breach of lease. AAR also says that nothing the Greek courts decide will have preclusive effects on a federal action because different issues are raised in each of these actions.

However, these arguments will not wash, and not just because on AAR's own representation the Athens cases do not seek "possession or recovery of the aircraft," nor because the issue of parallelism turns on the cause of action and not the remedy sought. There is a substantial likelihood that those cases will dispose of all the issues in the federal litigation because a single member of the Greek court, which normally sits as a panel of three, has found on an emergency hearing that AAR is liable to the defendants here (overlapping with some of the plaintiffs there) and has ruled in a preliminary way on damages. AAR offers no plausible reason to think that this ruling will be reversed by the full panel. If there will be anything more to litigate in this matter than liability and damages, AAR does not explain what it is.

If the ruling was to be upheld, that would probably end the matter. The Southern District of Texas stated that "there would be little reason to deny the preclusive effects" of a Greek judgment when "the recognizing jurisdiction has no concern with any of the parties or the underlying transaction." *Mpiliris v. Hellenic Lines, Limited,* 323 F. Supp. 865, 874 (S.D. Tx. 1969), *aff'd* 440 F.2d 1163 (5th Cir. 1971). The factors that led that court to deny preclusive effect, including different parties, *id.* at 873, and a substantial federal interest, *id.* at 874, do not apply here. *Accord Zorgias v. The SS Hellenic Star,* 370 F. Supp. 591, 593 (E.D. La. 1972), *aff'd* 487 F.2d 519 (5th Cir. 1973)(Greek judgment has preclusive effect when there was there is identity of the parties and cause of action.). *See also Vagenas, v. Continental Gin Company,* 988 F.2d 104, 106 (11th Cir. 1993) (1951 treaty between United States and Greece, 5 U.S.T. 1829, elevated foreign judgment to status of sister state judgment).

II.

I now must balance the considerations for and against abstention, bearing in mind the exceptional nature of the measure, "with the balance heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16, (1983). The Seventh Circuit directs me to consider a laundry list of factors: (1) the identity of the court that first assumed jurisdiction over the property; (2) the relative inconvenience of the federal forum; (3) the need to avoid piecemeal litigation; (4) the order in which the respective proceedings were filed; (5) whether federal or foreign law provides the rule of decision; (6) whether the foreign action protects the federal plaintiff's rights; (7) the relative progress of the federal and foreign proceedings; and (8) the vexatious or contrived nature of the federal claim. *Finova Capital Corp.* 180 F.3d at 898-99 (*citing Colorado River*, 424 U.S. at 818)). Taking these in order:

(1) The identity of the court that first took jurisdiction--Greek--favors abstention. AAR argues that this factor is neutral, because the issues in the first Athens action were "temporary"; but jurisdiction is jurisdiction. The second Athens action, morever, addresses the dispositive issues of liability and damages.

(2) AAR claims that the relative inconvenience of the federal forum favors my exercise of jurisdiction because the Greek forum is inconvenient for an Illinois firm. However, AAR's are not the only interests I must consider. The airplane, many critical witnesses, and documents are in Greece, and the defendants here are European firms, for whom a Greek forum is more convenient. I take judicial notice, also, that AAR's counsel advertises itself as a global law firm ("One Firm. One World. Connected." is the Baker & McKenzie slogan.), and is presumably able to litigate even in Athens.

(3) AAR also says that the need to avoid piecemeal litigation favors exercise of jurisdiction because Greek law

permits multiple lawsuits. However, the avoidance of piecemeal litigation is supposed to promote judicial economy, *Finova*, 180 F.3d at 899, and the most economical use of my time is to let the Greek courts handle it. To exercise jurisdiction would promote rather than reduce piecemeal litigation, since there would be then be three or four cases on different issues--according to AAR--on two continents. Besides, AAR does not deny that Greek law permits the consolidation of cases and the filing of counterclaims, which might be advisable anyway, in view of the probable preclusive effect of a Greek judgment.

(4) The order in which the respective proceedings were filed favors abstention because the defendants here filed first in Greece. AAR argues that the first Athens action was only a little claim about a nondispositive issue concerning provisional relief, but that action was part of a dispute arising from a single transaction (the alleged breach of the lease) or series of transactions. The second Athens action, moreover, did go to liability for the breach and damages, and was also filed before AAR went forum-shopping.

(5) Because this is an alienage case, the rule of decision is provided by Illinois law under the terms of the lease contract. There is no special federal interest. The Seventh Circuit said that an alienage case does not "involv[e] the application of legal rights or principles unique to, or specially protected by, federal law; the federal interest in the adjudication of a contractual dispute--even one governed by Illinois . . . law--is far from overwhelming." *Finova*, 180 F.3d at 900.

(6) AAR has four arguments that the foreign action will not protect the plaintiff's rights: Three of them boil down to the claim that AAR got adverse rulings in the Greek courts. The Athens court: (a) would not accept that AAR International was not identical to AAR Corp; (b) held that AAR may be liable to Vacances in spite of AAR's reading of the lease; (c) imposed a bank guarantee requirement despite its determination that AAR is

a publicly traded corporation. The principle seems to be that no court can be fair that does not rule for the plaintiff on every motion--a natural view for the party losing the motion, but one without legal support.

AAR's fourth argument, (d), is that Greece is ranked well below the United States on the "Transparency International Corruption Perception Index." Apparently I am supposed to exercise jurisdiction because some people perceive that "Greece" is "corrupt." There is not a whisper of evidence that the Athens Court is corrupt.

(7) AAR claims that the relative progress of the federal and foreign proceedings is not "relevant" because the first and third Athens actions were only for "provisional relief" and the second Athens action has only been set for hearing in December 2000, while I have set an "entirely realistic" trial date for January 2001. However the defendants are correct that the Athens court's findings in its January 25, 2000 order indicate that the court has made substantial progress in weighing the merits of the case, which I have not begun to do. The Greek proceedings are therefore much further advanced.

(8) AAR asserts, finally, that its claim was not vexatious or contrived but was bona fide and legitimate. Perhaps, but it is not enough.

Accordingly I GRANT the motion to abstain and DISMISS the case without prejudice. If there is anything to litigate in this matter that is not precluded when the Greek courts are done with it, AAR may file again.

ENTER ORDER:

/s/ Elaine E. Bucklo

Elaine E. Bucklo
United States District Judge

Dated: June 13, 2000

APPENDIX E:
SECTION 20.B. "NONEXCLUSIVE JURISDICTION IN ILLINOIS," AIRCRAFT LEASE AGREEMENT BETWEEN AAR INTERNATIONAL AND VACANCES HELIADES S.A., DATED MAY 14, 1998

* * * * * * * * *

Aircraft Lease Agreement Between
AAR International and Vacances Heliades S.A.

Dated May 14, 1998

* * * * * * * * *

20. GOVERNING LAW AND JURISDICTION

* * * * * * * * *

B. Nonexclusive Jurisdiction in Illinois

Lessee and Lessor each hereby irrevocably consents that any legal action or proceeding against it or any of its assets arising out of or relating to this Agreement or any other Operative Document may be brought in any jurisdiction where it or any of its assets may be found, in the courts of the United States of America for the Northern District of Illinois or in the Supreme Court of the State of Illinois, as the party bringing such action or proceeding may elect, and by execution and delivery of this Agreement each of Lessor and Lessee hereby irrevocably submits to and accepts with regard to any such action or proceeding, for itself and in respect of its assets, generally and unconditionally, the jurisdiction of the aforesaid

courts and irrevocably agrees to be bound by any judgment rendered thereby. Nothing herein shall prevent any party from bringing any legal action or proceeding or obtaining execution of judgment in any other appropriate jurisdiction. Lessee and Lessor further agree that a final judgment in any action or proceeding arising out of or relating to this Agreement or any other Operative Document shall be conclusive and may be enforced in any other jurisdiction within or outside the United States of America by suit on the judgment, a certified or exemplified copy of which shall be conclusive evidence of the fact and the amount of the indebtedness or liability therein described, or in any other manner provided by Law. Each of Lessee and Lessor hereby irrevocably waives, to the fullest extent permitted by Law, any objection which it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement or any other Operative Document brought in any court in or of the State of Illinois, and hereby further irrevocably waives any claim that any such suit, action or proceeding brought in any court in or of the State of Illinois has been brought in an inconvenient forum. Lessee shall maintain the process agent specified for it in Section 20(C), or such other Person located within the State of Illinois as may be acceptable to Lessor, as its agent for service of process in the State of Illinois during the Term, at Lessee's sole cost and expense. LESSEE HEREBY WAIVES TRIAL BY JURY IN ANY JUDICIAL PROCEEDING TO WHICH IT IS A PARTY INVOLVING, DIRECTLY OR INDIRECTLY, ANY MATTER ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OTHER OPERATIVE DOCUMENT.

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(2)

Supreme Court, U.S.
FILED
SEP 25 2001
OFFICE OF THE CLERK

No. 01-346

IN THE

Supreme Court of the United States

VACANCES HELIADES S.A. and
NIMELIAS ENTERPRISES S.A.,

Petitioners,

v.

AAR INTERNATIONAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners claim that the question presented is whether dispositive or non-dispositive weight should be given to a contractual forum selection clause. This question is not raised by the facts of the case or by the decisions of the courts below. Consistent with such facts and decisions, the question presented is properly the following:

> In an aircraft lease freely negotiated between sophisticated international parties, should an unambiguous clause providing that the parties shall waive any objections to venue in an Illinois state or federal court and any claim that such court is an inconvenient forum (the "Venue/ Inconvenient Forum Waiver Clause") be enforced in accordance with its terms, subject only to limited exceptions as to enforceability and validity that Petitioners have conceded are not present in this case?

STATEMENT PURSUANT TO RULE 29.6

Respondent, AAR International, Inc., states that its parent corporation is AAR Corp., and that no publicly held company other than AAR Corp. owns 10% or more of Respondent's stock.

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Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts after Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55 (1992) 7, 8

Respondent, AAR International, Inc., respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Seventh Circuit's opinion in this case.

OPINIONS BELOW

The Petition erroneously states that the opinion of the court of appeals is reported at *AAR Int'l Inc. v. Nimelias Enters. S.A.*, 250 F.3d 527 (7th Cir. 2001). [Pet. at p. 1]. The correct citation is 250 F.3d 510.

STATEMENT OF THE CASE

Petitioners freely entered into an Aircraft Lease Agreement dated May 14, 1998 (the "Lease") with Respondent, whose substantive and procedural terms Petitioners now seek to avoid.[1]

The substantive provisions that Petitioners do not wish enforced are in Sections 4 and 1E of the Lease. Section 4 provided that Respondents leased a Boeing 737-3Q8 aircraft (the "Aircraft") to Petitioners on an "as is" basis and made no warranties whatsoever about its condition. [Respondent's Appeal Br., App. 4 at p. 12]. The undisputed facts in the record show that this is fully consistent with the custom and

1. Petitioners, Vacances Heliades S.A., Nimelias Enterprises S.A., and another defendant in the courts below, Princess Airlines S.A., were the Lessee, Sublessee and Subsublessee of the Aircraft, respectively. Petitioners have assigned to Respondent their rights as Sublessor and Subsublessor under the Sublease and the Subsublease, respectively. Consequently, each of Petitioners and Princess Airlines S.A. are liable to Respondent. Because the Lease, the Sublease and the Subsublease are substantially identical, this Brief will refer only to the provisions of the Lease.

practice in the aircraft leasing industry, where the lessee assumes any risk regarding the condition of the leased aircraft, including its engines. Section 1E of the Lease further provided that Respondents' obligations under the Lease are "absolute and unconditional under any and all circumstances and regardless of other events" and are not subject to "any right of set-off, counterclaim, recoupment, defense or other right," or the unavailability or other interruption in the use of the Aircraft for any reason. [*Id.* at App. 4 p. 6].

The procedural provision that Petitioners seek to circumvent is in Section 20B of the Lease. Section 20B provided for non-exclusive jurisdiction in the Illinois federal and state courts, but also contained an unambiguous Venue/ Inconvenient Forum Waiver Clause that required that neither the Lessee nor the Lessor shall object to venue in an Illinois court, and that they waive any inconvenient forum claim. [Pet., App. B at 21]. In their response brief in the Seventh Circuit, Petitioners conceded that the enforceability of Section 20B of the Lease is "an issue not generally disputed" by it. [Petitioners' Appeal Br. at p. 31].

As of August 23, 1999, Petitioners were in default of multiple obligations under the Lease. The defaults included the following: (i) Petitioners had permitted delinquent EuroControl[2] charges to accrue with respect to the Aircraft; (ii) Petitioners had failed to comply with their obligations to keep the Aircraft in good operating condition; and (iii) Petitioners had failed to pay Variable Rent under the Lease for July, 1999. This led the Owner Trustee of the Aircraft and Respondent to provide Petitioners with written

2. EuroControl is the European Organization for the Safety of Air Navigation.

notice of default on August 23, 1999 and with written notice of termination of the Lease on September 7, 1999. [R.1 at p. 5]. Petitioners have never disputed the fact that they were in default of the Lease. [Respondent's Reply Br. at pp. 2-3].

Petitioners' defense to their default is that they have had to repair one of the engines on the Aircraft. [R.6]. In an Illinois court construing the Illinois law that controls the Lease, Respondents would have no hope of prevailing on this defense. Indeed, Section 2A-214 of the Uniform Commercial Code as adopted in Illinois, 810 ILCS 5/2A-214 (2001), expressly validates the exclusion of warranties such as provided for in Section 4 of the Lease.

In order to avoid litigation in Illinois, on October 1, 1999, or shortly *after* receiving the notices of default and termination, Petitioners commenced legal proceedings against Respondent for breach of warranty in Athens, Greece.[3] [R.8 Ex. C at pp. 1, 15]. In ordering a preliminary attachment of the Aircraft on January 25, 2000 to secure Petitioners' alleged claims, the Greek court ignored the provisions of the Lease that unambiguously provided that Respondent had made no warranties regarding the Aircraft.[4] [R.6, Ex. Q at pp. 2-3].

---

3. Princess Airlines S.A., the Subsublessee of the Aircraft and a defendant in the courts below, is a Greek corporation with its principal place of business in Hellinkon, Greece.

4. In granting the attachment, the Greek court also ruled, without evidentiary support, that Respondent and its parent company are "one and the same legal person" and that Respondent's parent company's assets are "doubtful" and that the Aircraft is its "sole negotiable asset". [R.8 Ex. Q at pp. 3-4].

On December 13, 1999, Respondent filed suit on its claims in the United States District Court for the Northern District of Illinois. The District Court on June 13, 1999 granted Petitioners' motion for abstention under *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), and did not reach Petitioners' *forum non conveniens* motion. *AAR Int'l, Inc. v. Vacances Heliades S.A.*, 100 F. Supp. 2d 875, 876 (N.D. Ill. 2000). In its April 27, 2001 ruling, the Seventh Circuit reversed the District Court's ruling on abstention. 250 F.3d at 517-23. The Seventh Circuit further held that Petitioners' *forum non conveniens* motion must be denied, that the Venue/Inconvenient Forum Waiver Clause must be enforced, and that the litigation that Respondent filed is to proceed in the Illinois District Court. *Id.* at 523-27.

Petitioners do not seek review of the Seventh Circuit's ruling denying their motion for abstention. Instead, they suggest that this Court should grant its writ of certiorari in order to determine whether, in the context of a *forum non conveniens* motion, an unambiguous Venue/Inconvenient Forum Waiver Clause in an international commercial lease is to be enforced in accordance with its terms.

REASONS FOR DENYING THE WRIT

1. There is no conflict between the First Circuit's holding in *Royal Bed* and the Seventh Circuit's holding in this case.

Petitioners claim that this Court should grant certiorari because there is a conflict between the First Circuit's holding in *Royal Bed & Spring Co., Inc. v. Famossul Indus. e Comercio de Moveis Ltda.*, 906 F.2d 45 (1st Cir. 1990),

and the Seventh Circuit's holding in this case. [Pet. at pp. 6-7]. However, these holdings are entirely reconcilable and consistently reasoned.

The forum selection clause in *Royal Bed* designated: "'The judicial district of Curitiba, State of Parana, Brazil, as competent to settle any disputes or interpretations derived from this letter. . . .'" 906 F.2d at 46. That forum selection clause, by its terms, was non-exclusive. In view of that clause's non-exclusivity, the First Circuit correctly held that it was only one of the factors that should be considered and balanced in deciding the defendant's *forum non conveniens* motion.

Section 20B of the Lease in this case provides for non-exclusive jurisdiction in Illinois, but also includes the following Venue/Inconvenient Forum Waiver Clause:

> Each of Lessee and Lessor hereby irrevocably waives, to the fullest extent permitted by Law, any objection which it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement or any other Operative Document brought in any court in or of the State of Illinois, and hereby further irrevocably waives any claim that any such suit, action or proceeding brought in any court in or of the State of Illinois has been brought in a inconvenient forum. [Pet., App. E at p. 2].

This express Venue/Inconvenient Forum Waiver Clause was the basis for the Seventh Circuit's holding denying Petitioners' *forum non conveniens* motion. 250 F.3d

at 525-27. Because the contract in *Royal Bed* did not include such an express waiver, the facts of that case are entirely distinguishable.

Indeed, the holding of the First Circuit in *Royal Bed* is consistent with the holding of the Seventh Circuit in this case. In *Royal Bed*, the First Circuit noted that forum selection clauses in international commercial contracts generally should be enforced. 906 F.2d at 53. Finding that there was neither overreaching nor other factors that would counsel against application of the forum selection clause, the First Circuit ordered its specific enforcement. *Id. A fortiori*, the First Circuit would have ordered the specific enforcement of the Venue/Inconvenient Forum Waiver Clause appearing in Section 20B of the Lease. Consequently, there is no conflict between the First Circuit's holding in *Royal Bed* and the Seventh Circuit's holding in this case.

2. There is no conflict between this Court's holdings in *The Bremen* and *Stewart*.

Petitioners claim that this Court's holdings in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), have given rise to two inconsistent lines of cases, which they ask be reconciled. [Pet. at pp. 2-3]. Petitioners fail to recognize the essential difference between the issues decided in these two cases and their respective progeny.

Stewart involved a motion to transfer venue to another federal district court pursuant to 28 U.S.C. § 1404(a). In that statute, Congress specifically directed the federal district courts to consider a broad range of factors in deciding whether a case should be transferred. This Court therefore

held that a forum selection clause should not be automatically enforced or dismissed, but should receive "rather the consideration for which Congress provided in § 1404(a)." 487 U.S. at 31. However, the application of 28 U.S.C. § 1404(a) is limited by its terms to transfers from one federal district court to another federal district court. Thus, the statute does not apply to *forum non conveniens* motions when the alternative forum is in a foreign nation, as it is in this case.

In contradistinction, *The Bremen* involved the enforcement of a forum selection clause in the context of a *forum non conveniens* motion where the alternative forum was in London. This Court held that: "in the light of present-day commercial realties and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside." 407 U.S. at 15. This Court's holding in *The Bremen* reflects the fact that *forum non conveniens* motions are not governed by 28 U.S.C. § 1404(a), and that, in enacting that provision, Congress did not intend to interfere with the strict enforcement of forum selection clauses in the international context.

Accordingly, there is no conflict between *Stewart* and *The Bremen*. The holdings of these cases demonstrate this Court's recognition that a different standard should apply when transfer is requested under 28 U.S.C. § 1404(a) from one federal district court to another, as opposed to when a *forum non conveniens* motion is brought seeking dismissal in favor of an alternative forum in foreign nation.[5] The facts

5. Petitioners claim not to "understand why an identical forum selection clause should be treated differently in motions to transfer venue and in motions to dismiss on grounds of *forum non conveniens*." [Pet. at p. 6]. To buttress this argument, they cite a (Cont'd)

of this case place it squarely in line with the *The Bremen*, and render Petitioners' invocation of *Stewart* irrelevant.

3. None of the cases cited in the Petition deals with an express Venue/Inconvenient Forum Waiver Clause.

Petitioners cite a number of cases which, in interpreting a forum selection clause, hold that the clause was permissive and therefore not mandatory. [Pet. at pp. 7-10]. These cases are irrelevant because none of them involves an express Venue/Inconvenient Forum Waiver Clause such as that included in Section 20B of the Lease. Petitioners place their principal reliance on two cases, *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974 (2d Cir. 1993), and *Fil Leveraged U.S. Government Bond Fund Ltd. v. TCW Funds Mgmt., Inc.*, 1998 U.S. App. LEXIS 17586, at *5 (9th Cir. July 29, 1998).

Petitioners state that: "The Seventh Circuit acknowledged that the Second Circuit took the contrary view of a similar clause in *Blanco*. . . ." [Pet. at p. 8]. However the forum selection clause in *Blanco* did *not* include a Venue/ Inconvenient Forum Waiver Clause. Indeed, the Second Circuit expressly indicated that if the choice of forum clause at issue had been strengthened by additional waiver language, the permissive clause would have been converted into a mandatory clause similar to that enforced in *The Bremen*, 997 F.2d at 979.

(Cont'd)
commentator's description of this phenomenon as a "bizarre dichotomy." Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts after Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 70-71 (1992). Read in context, this "bizarre dichotomy" only occurs when "the selected forum is another federal court." *Id.* Obviously then, this dichotomy is inapplicable here.

Petitioners similarly claim that *Fil* is "in direct conflict with the case presented for review." [Pet. at p. 9]. However, *Fil* is likewise inappropriate as there is no Venue/ Inconvenient Forum Waiver Clause in the forum selection provision at issue. *Fil*, like the rest of Petitioners' cited cases, concerns the "difference between exclusive (mandatory) forum selection clauses and non-exclusive (permissive)," but it cannot possibly be understood as in "direct conflict" with the Seventh Circuit's decision in this case. 1998 U.S. App. LEXIS 17586, at *5.

In sum, there is no conflict among the courts of appeal. Petitioners have not cited a single analogous case that has failed to enforce a Venue/Inconvenient Forum Waiver Clause.

4. There is no basis to disregard the Venue/Inconvenient Forum Waiver Clause in Section 20B of the Lease.

Petitioners make the incredible argument that: "It is hard to understand why added language in a forum selection clause specifically stating that a party will not object to a chosen forum should have any effect at all, much less turn a decision one way or the other." [Pet. at p. 9]. The sole support that Petitioners offer for this argument is a citation to *The Bremen*, which, they contend, supports their position that a claim of inconvenience should not stand to invalidate a forum selection clause. [*Id.*]. However, *The Bremen* involved a situation where a party freely consented to a forum selection clause, but then challenged it as inconvenient. 407 U.S. at 16. *The Bremen* thus supports Respondent, because it is Petitioners who are attempting to avoid the effect of the Venue/Inconvenient Forum Waiver Clause to which they expressly consented.

In a case construing an arbitration clause, this Court stated that "respondents' reading of the two clauses violates another cardinal principle of contract construction: that a document should be read to give effect to all its provisions and to render them consistent with each other." *Mastrobuono v. Shearson Lehman Hutton,* 514 U.S. 52, 63 (1995). Petitioners ignore this principle in contending that no weight at all should be given to the Venue/Inconvenient Forum Waiver Clause in Section 20B of the Lease.

The courts of appeal uniformly have recognized the significance of a Venue/Inconvenient Forum Waiver Clause, and understand that it can be read consistently with a choice of forum provision. As discussed above, the Second Circuit in *Blanco* held that the absence of such language was outcome determinative in holding that a choice of forum clause was permissive. In *Waters v. Browning Ferris Indus., Inc.*, 252 F.3d 796, 798 (5th Cir. 2001), the Fifth Circuit likewise enforced a clause providing that the defendant had specifically "waive[d] any objection it may have to the laying of venue of any such suit, action or legal proceeding in any of such courts." This provision led "to the inescapable conclusion that the plaintiff negotiated with the defendant a clear right to establish 'irrevocably' the place where his suit could be filed and heard." *Id.* The Fifth Circuit further noted that it reached this decision by reading all of the relevant clauses together, consistent with the principles of contract interpretation and with the Seventh Circuit's approach in this case.

5. The Seventh Circuit's ruling in this case was correct.

This Court has made clear that this Court's discretionary review: "depends on numerous factors other than the perceived correctness of the judgment we are asked to

review." *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). Although this factor therefore merits relatively little consideration, the Seventh Circuit's ruling in this case was clearly correct for reasons that include the following:

a. The ruling advances the goals of certainty and predictability in international transactions.

Petitioners correctly state that it is desirable to advance the goals of certainty and predictability as to venue in international litigation. [Pet. at pp. 11-12]. Indeed, they quote the following from *The Bremen*, 407 U.S. at 13-14: "The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element of international trade, commerce, and contracting." [*Id.* at p. 11]. In cases subsequent to *The Bremen*, this Court has reaffirmed the importance of enforcing forum selection clauses in international contracts. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) ("A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."); *Mitsubishi Motors Corp. v. Soler*, 473 U.S. 614, 629 (1985) ("*The Bremen* and *Scherk* establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions.").

The result that Petitioners advocate in this case is curiously inconsistent with the goals of certainty and predictability in international transactions that they purport to espouse. Petitioners urge this Court to hold that the district courts should disregard the express language of a Venue/

Inconvenient Forum Waiver Clause and instead should balance a myriad of factors in deciding which forum is the most convenient. This proposed holding would result in enormous confusion and uncertainty as to where venue properly lies.

The goals of certainty and predictability are best advanced by holding that an express Venue/Inconvenient Forum Waiver Clause in an international commercial contract is to be enforced in accordance with its terms subject only to limited exceptions as to enforceability and validity. This is exactly what the Seventh Circuit has held in this case.

b. The ruling is consistent with this Court's holdings enforcing arbitration clauses.

This Court consistently has upheld and enforced contracts involving arbitration clauses in a variety of contexts. *See, e.g., Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91 (2000) (liberal federal policy enforcing arbitration agreements should be protected); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995) (the benefits accorded the United States in participation in international transactions weigh against construing a federal statute to "nullify foreign arbitration clauses.").

Most recently, in *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 121 S. Ct. 1589, 1592 (2001), this Court held that the Potawatomi Tribe's agreement to an arbitration clause in a contract rendered the Tribe amenable to suit in a state court to enforce the arbitration award. This Court concluded that: "the Tribe

clearly consented to arbitration and the enforcement of arbitral awards in Oklahoma state court; the Tribe thereby waived its sovereign immunity from C & L's suit." *Id.* at 1597.

Vacances Heliades likewise knowingly and explicitly waived its right to object to the chosen venue and to raise inconvenient forum claims. The same principles that support the enforcement of a clause waiving objections to an arbitration clause likewise require the enforcement of the Venue/Inconvenient Forum Waiver Clause.

c. The ruling is consistent with this Court's holdings that contractual language will be enforced according to its express terms absent compelling grounds to the contrary, and that a contract should be read to give effect to all its provisions.

The holding of *The Bremen* put forum selection clauses on the same footing as all other contractual provisions: "we conclude that the forum selection clause should control absent a strong showing that it should be set aside." 407 U.S. at 15. *See also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("ordinary state-law principles that govern the formation of contracts" generally apply to arbitration provisions); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995) (arbitration provisions should be treated with the same weight as the other provisions of the contract).

Petitioners are asking this Court to grant certiorari to determine whether the Venue/Inconvenient Forum Waiver Clause in Section 20B of the Lease should be enforced in

accordance with its terms. Because this Court's holdings clearly require such enforcement, there is no reason for this Court to grant review.

d. The ruling is consistent with the trend in state legislation.

Several states, including Illinois[6] (the forum state in this case), New York[7], Florida[8], Delaware[9], Ohio[10] and North Carolina[11] have enacted legislation regarding the enforcement of contractual choice of forum clauses. These states have recognized that such clauses are indispensable in commercial transactions and have codified that recognition.

For example, the Illinois statute provides for the enforceability of an Illinois choice of forum clause in a commercial contract arising out of a transaction of not less than $500,000. 735 ILCS 5/22-105-10. The New York law has been interpreted by state appellate authority as a "statutory mandate that a clause designating New York as the forum "shall" be enforceable, in cases involving $1 million or more, regardless of any inconvenience to the parties." *National Union Fire Ins. Co. of Pittsburgh v. Worley*,

6. 735 ILL. COMP. STAT. 5/22-105-10 (1998).

7. NY CLS. GEN. OBLIG. § 5-1402 (2001).

8. FLA. STAT. Ch. 685.101, ch. 685.102 (2000).

9. DEL. CODE ANN. tit. 6, § 2708 (2001).

10. OHIO REV. CODE ANN. § 2307.39 (2001).

11. N.C. GEN. STAT. § 22B-3 (2000).

690 N.Y.S.2d 57, 59 (N.Y. App. Div. 1999). The New York federal courts likewise have enforced this statutory provision. *See International Med. Tech., Inc. v. Lintech, LLC*, 2000 U.S. Dist. LEXIS 19522, at *5 (S.D.N.Y. Sept. 25, 2000); *Composite Holdings, LLC v. Westinghouse Elec. Corp.*, 992 F. Supp. 367, 370 (S.D.N.Y. 1998) (noting that its courts have consistently held that "the public policy of New York strongly supports enforcement of forum selection clauses.").

The enactment of these state statutes demonstrates a general trend toward enforcement of choice of forum provisions and bolsters the Seventh Circuit's decision to enforce the Venue/Inconvenient Forum Waiver Clause in Section 20B of the Lease.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 01-346

Supreme Court, U.S.
FILED
OCT 10 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

VACANCES HELIADES S.A. AND NIMELIAS ENTERPRISES S.A.,
Petitioners,

v.

AAR INTERNATIONAL, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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No. 01-346

IN THE

Supreme Court of the United States

VACANCES HELIADES S.A. AND NIMELIAS ENTERPRISES S.A.,
Petitioners,

v.

AAR INTERNATIONAL, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioners Vacances Heliades S.A. and Nimelias Enterprises S.A. submit this reply to the Respondent's Brief in Opposition ("Opp. Br.") to Petitioners' petition for a writ of certiorari (the "Petition"). Review is sought to resolve conflicts among the federal courts of appeals regarding the weight to be given to a clause in a business agreement designating a forum for resolution of disputes about the agreement.

INTRODUCTION

In the Petition, we pointed out that different standards apply to the important question of whether a forum selection clause should be given dispositive effect or be considered as one factor with other factors, and that the answer to that question is guided differently in two opinions of this Court.

The Bremen v. Zapata Off-Shore Co., gives it dispositive effect, 407 U.S. 1, 15 (1972), and *Stewart Organization, Inc. v. Ricoh Corp.*, treats it as one factor. 487 U.S. 22, 29 (1988). The Respondent agrees: "The holdings of these cases demonstrate this Court's recognition that a different standard should apply when transfer is requested under 28 U.S.C. § 1404(a) from one federal district court to another, as opposed to when a *forum non conveniens* motion is brought seeking dismissal in favor of an alternative forum in foreign nation." Opp. Br. at 7.[1]

In our petition, we pointed out that confusion has resulted and that the courts of appeals are divided in two respects: first, as to whether to treat the forum selection clause as dispositive or only as one factor; and, second, how to characterize these clauses – whether the language of the forum selection clause designates only one forum or more than one forum and requires, or merely permits, the forum selection. Petition at 2-3. We pointed out that the decision of the U.S. Court of Appeals for the Seventh Circuit in this case raises both issues, and that the Seventh Circuit candidly observed that its decision conflicts with other courts of appeals on both issues. Petition at 6-10.

In its Brief in Opposition, Respondent argues that all of the decisions can be reconciled and that there are no conflicts. Opp.

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[1] The Respondent states that there are "essential differences" between the issues involved within the context of a motion to transfer venue pursuant to § 1404(a) and a motion to dismiss for *forum non conveniens*. Opp. Br. at 6. While Congress in § 1404(a) directed federal district courts to consider certain factors in deciding whether a case should be transferred, most of the factors that federal district courts consider in both contexts are judge-made and they are substantially similar. *See* 17 MOORE'S FEDERAL PRACTICE § 111.03 at *4, n.9 (transfer factors same as *forum non conveniens* factors); 17 Moore's Federal Practice § 111.13 at *4 (Section 1404); 17 Moore's Federal Practice § 111.74 at *8 (*forum non conveniens*); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947); and *Stewart*, 487 U.S. at 29.

Br. at 5-8. They cannot be reconciled, and the attempt to do so fails.[2]

ARGUMENT

I. There Is A Conflict Between The Seventh Circuit's Holding In This Case And The First Circuit's Holding in *Royal Bed*

The Seventh Circuit in this case stated it was following *The Bremen* and that the forum selection clause, which it deemed mandatory, was dispositive of the *forum non conveniens* motion as a matter of law. App. B (to the Petition), B - 24-25. The district court had not addressed the issue. App. B, B-19. By contrast, in *Royal Bed & Spring Co., Inc. v. Famoussul Indus. e Comercio de Moveis Ltda.*, the First Circuit said it was following *Stewart* and affirmed the district court's balancing approach. 906 F.2d 45, 51 (1st Cir. 1990). The First Circuit agreed with the district court's statement that the forum selection clause (providing for a Brazilian forum) "'should not receive a dispositive consideration . . . but should rather be considered a significant factor that will figure centrally in our balancing of factors.'" *Id.* at 47 (quoting the district court).

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[2] Respondent asserts that, "[r]ead in context," the "bizarre dichotomy" noted in the Petition (Petition at 6-7, n.4) that results from the conflicting enforcement of a forum selection clause in the context of a motion to transfer venue versus other motions, only occurs when "'the selected forum is another federal court.'" Opp. Br. at 6 – 7, n. 5. It is clear that the dichotomy also occurs when the selected forum is a foreign court. Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 71 (1992) ("A corollary to this is that if the selected forum is a foreign court or a state court, Stewart does not apply at all because a transfer motion is unavailable. Thus, assuming that Bremen applies in all federal court cases, forum selection agreements have more force in international agreements than they do in domestic matters.")

The First Circuit observed that this Court said in *Piper Aircraft Co. v. Reyno* that:

> 'the forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.'

Id. at 47 (quoting 454 U.S. 235, 257 (1981)). The First Circuit applied this principle in deciding the case before it. It noted that "Stewart . . . teaches that . . . a district court . . . may . . . still `refuse to transfer a case notwithstanding the counterweight of a forum selection clause .. . .'" *Id.* at 51 (quoting *Stewart*, 487 at 30-31).

The First Circuit in *Royal Bed* then summarized the private and public interest factors weighed by the district court. *Id.* at 52. Royal Bed, a Puerto Rico corporation, distributes furniture products in Puerto Rico that were manufactured in Brazil by a Brazilian company. *Id* On the one hand, the district court in Puerto Rico "acknowledged that Royal Bed's choice of a forum was entitled to great deference since it chose a home forum," *id.*, and that all the sales took place in Puerto Rico to Puerto Rican accounts for use in Puerto Rico. *Id.*

On the other hand, the district court took into account that the contract was signed in Brazil and drafted in Portuguese and that Royal Bed was no stranger to the judicial system of Brazil since it previously litigated its disputes in the courts of Brazil and obtained favorable results. *Id.* "'Moreover, the contract contains a forum selection clause providing [for a Brazilian forum].'" *Id.* (quoting the district court, emphasis added).

The district court concluded that Brazil was the most convenient forum. The First Circuit stated that "the forum – selection provision . . . is not given dispositive effect. Rather, it is simply one of the factors that should be considered and

balanced by the courts in the exercise of sound discretion. See Stewart, 108 S. Ct. at 2245." *Id.* at 51. The Court of Appeals concluded: ". . . it is clear that the district court thoroughly considered and properly balanced all of the relevant public and private interest factors for a forum non conveniens dismissal. Since the balancing of these factors was reasonable, it cannot be said that the district court abused its discretion." *Id.* at 53.

The Brief in Opposition mischaracterizes the comparison of this holding of the First Circuit in *Royal Bed* with the holding of the Seventh Circuit in this case as "consistently reasoned." Opp. Br. at 5. Respondent's statement that the reason for the First Circuit's holding that the forum selection clause was only one factor to be balanced was because that clause was "non-exclusive" cannot be supported by *Royal Bed*. *Id.* Nothing in the First Circuit's opinion mentions "exclusive" or "non-exclusive."

Nor is there a basis for the statements in the Brief in Opposition that "the First Circuit ordered [the forum selection clause's] specific enforcement" or that "the First Circuit would have ordered the specific enforcement" of the forum selection clause in the instant case. *Id.* at 6. The First Circuit simply affirmed a district court's balancing of factors as reasonable and thus not an abuse of discretion. *Royal Bed*, 906 F.2d at 53.

The *Stewart* – inspired balancing approach in *Royal Bed* directly conflicts with *The Bremen* - inspired dispositve approach in the instant Seventh Circuit case and this conflict warrants review by this Court.[3]

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[3] The Seventh Circuit itself illustrated the conflict between the federal courts of appeals by noting that some of its "sister circuits" found forum selection clauses dispositive under this Court's decision in *The Bremen* in the consideration of a motion to dismiss for *forum non conveniens*, while another circuit court found such forum selection clauses to be one of several factors to be considered and balanced using this Court's analysis in *Stewart*. App. B-22 – B-23 (*comparing Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V.*, 145 F.3d 505 (2d Cir. 1998) *and Mitsui & Co. (USA), Inc. v. Mira M/V*, 111 F.3d 33 (5th Cir. 1997) *with Royal Bed*.

II. There Is A Conflict Between The Seventh Circuit's Holding In This Case And The Second Circuit's Holding In *Blanco* And The Ninth Circuit's Holding In *Fil*

Respondent asserts that a provision in the forum selection clause in this case providing that neither party would challenge the other party's choice of forum in Illinois as inconvenient is outcome determinative in this case. Opp. Br. at 5, 6, 8, 9, and 10. Respondent calls this provision (for the first time in this litigation) a "Venue/Inconvenient Forum Waiver." *Id.* at 2. Respondent argues that the cases cited in the Petition as conflicting with the Seventh Circuit's decision in this case, *see* Petition at 8-9 (citing *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974 (2d Cir. 1993) and *Fil Leveraged U.S. Government Bond Fund Ltd. v. TCW Funds Mgmt. Inc.*, 1998 U.S. App. LEXIS 17586, at *5 (9th Cir. July 29, 1998)), present no conflict because they do not involve such a provision. Opp. Br. at 8. In support of their argument that such a provision should be enforced, Respondent cites to a number of decisions of this Court enforcing agreements to arbitrate. Opp. Br. at 12-13. These cited decisions give effect to the strong federal policy supporting arbitration under the Federal Arbitration Act. There is no federal policy favoring a provision in a forum selection clause providing that a party will not object to a forum on the ground that it is not convenient. However, there is a strong federal policy in favor of certainty and predictability in forum selection clauses. *The Bremen*, 487 U.S. at 10-15. The agreement in this case, providing for venue virtually anywhere in the world, fails that policy. App. E., E-1.

It is hard to understand why language in a forum selection clause not to object to one of many possible venues should have any effect at all, much less turn a decision one way or the other. Presumably any such nonobjections would be implicit in the parties' agreement to the clause.

The negative implication of Respondent's argument (and of the holding as a matter of law by the Seventh Circuit in this case) is that in the absence of such a no-objection clause it is

appropriate for a party to object to a forum to which he has agreed by contract. *The Bremen* rejects that. *See* 407 U.S. at 16. The First Circuit so noted in *Royal Bed*:

> ...[A]ccording to the Supreme Court, a showing of inconvenience as to a foreign forum would not be enough to hold a forum selection clause unenforceable....Indeed, the Supreme Court stated specifically that 'it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.'

Royal Bed, 906 F.2d at 49 (quoting *The Bremen*, 407 U.S. at 18).

The only thing that such a clause adds is an artful drafting trap for businessmen and their lawyers and more confusion to an area of the law that should be predictable. This no-objection clause is of no relevance. If it is not given effect, both *Blanco* and *Fil* conflict with the Seventh Circuit decision in this case and warrant review by this Court.[4]

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[4] The Seventh Circuit itself acknowledged that, aside from giving effect to a no-objection provision, *Blanco* took a different view of a similar "nonexclusive" and "permissive" clause. App. B., B-24.

CONCLUSION

For the reasons set forth in the Petition and herein, it is respectfully requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

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October 2001